No. 86-567

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

J. FRANK CURRY, DANIEL R. FARNELL, SR., and CHARLES A. GRADDICK,

Petitioners,

v.

JOHN BAKER, as Chairman of the Alabama State Democratic Executive Committee, the ALABAMA STATE DEMOCRATIC EXECUTIVE COMMITTEE, WILLIAM J. BAXLEY, KENNETH PIKE, NELLIE PIKE, JERRY HENDERSON, and DEJERILYN HENDERSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Hamilton P. Fox, III
[Counsel of Record]
Joseph A. Califano, Jr.
Dewey, Ballantine, Bushby, Palmer & Wood
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 429-2335

Counsel for Petitioners

Of Counsel:

Champ Lyons, Jr.
Coale, Helmsing, Lyons & Sims, P.A.
150 Government Street
Suite 2000
Mobile, Alabama 36602
(205) 432-5521

Hobart A. McWhorter, Jr.
Walter J. Sears, III
Bradley, Arant, Rose & White
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

David B. Ellis
Eugene C. Copeland
Ellis & Copeland
610 Lurleen Wallace Boulevard, North
Tuscaloosa, Alabama 35401
(205) 752-5538

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QUESTIONS PRESENTED

I. Where a political party in a primary election contest decides that contest by using pre-election opinion polls rather than by counting the legal votes cast, does that party interfere with the constitutionally protected right to vote and have that vote counted?

II. Assuming that there has been an interference with the constitutionally protected right to vote, is the use of pre-election opinion polls to decide an election contest, instead of a new election, the least restrictive means of serving the state's interest in ensuring fair elections and preserving the rights of political parties and voters?

LIST OF PARTIES

All parties to the proceeding below are listed in the caption of the case in this Court.

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JOHN BAKER, as Chairman of the Alabama State Democratic Executive Committee, the ALABAMA STATE DEMOCRATIC EXECUTIVE COMMITTEE, WILLIAM J. BAXLEY, KENNETH PIKE, NELLIE PIKE, JERRY HENDERSON, and DEJERILYN HENDERSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on October 1, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reprinted in the appendix hereto, beginning at p. 82a.

The memorandum opinion and orders of the United States District Court for the Northern District of Alabama (Guin, D.J.) are reprinted in the appendix hereto, beginning at p. 1a.

JURISDICTION

On September 18, 1986, the United States District Court for the Northern District of Alabama entered its final decree, granting the relief requested by petitioners. On October 1, 1986, the United States Court of Appeals for the Eleventh Circuit entered its order reversing the District Court's final decree. On October 2, 1986, the Eleventh Circuit entered its order denying petitioners' motion for a stay pending this Court's decision. On October 3, 1986, petitioners filed

with this Court an emergency application for a stay of the Eleventh Circuit's order pending this Court's decision. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 24, 1986, petitioners Curry and Farnell and thousands of other Alabama voters went to the polls and elected petitioner Graddick as the Democratic Party's nominee for Governor. Nevertheless, on August 15, respondents Baker and the Alabama State Democratic Executive Committee (the "SDEC"), relying on pre-election polls, certified respondent Baxley, the loser of the June 24 election, as the Democratic gubernatorial nominee.

Seeking an injunction requiring the SDEC to conduct a new election between Graddick and Baxley, petitioners Curry and Farnell and petitioner Graddick filed separate actions in the United States District Court for the Northern District of Alabama. (The actions were later consolidated.) The District Court's jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1343(4). Plaintiffs below asserted that, in certifying Baxley,

respondents Baker and the SDEC had violated plaintiffs' rights under the due process clause, depriving them of the right to vote and have one's vote counted, the right of access to the ballot, and other fundamental constitutional rights.

On September 18, the District Court decided in plaintiffs' favor and ordered the SDEC to conduct a new election between Graddick and Baxley. On October 1, the United States Court of Appeals for the Eleventh Circuit reversed the District Court's order.

* * * *

The SDEC is the governing body of the Alabama Democratic Party. On April 21, 1979, the SDEC adopted the following rule:

> Any person who (1) votes in any primary election of another political party, (2) participates in the nominating process of another party's candidate(s), or (3) promotes the candidacy of an independent candidate, shall not be entitled to vote in the Primary Election of the Democratic Party held in the calendar year in which such person does any of said prohibited act(s). Without limiting the foregoing, any person who votes in the first primary election of another

> political party shall not be entitled to vote in the Democratic Party's Run-off Primary Election which follows such first primary election.

Alabama Democratic Party Rules, Article VII(1)(e).

For purposes of this action, this rule has two relevant provisions. First, the rule prohibits voters who participate in the initial round of the Republican Party primary from voting in the subsequent Democratic Party runoff. (This provision is hereinafter referred to as the "Crossover Provision.") Second, the rule prohibits persons who have promoted the candidacies of independent candidates during any calendar year from voting in any Democratic primary election conducted during that year, including any run-off election. (This provision is hereinafter referred to as the "Independents Provision.")

The SDEC conducted the Democratic Party's 1986 primary election on June 3. The Alabama Republican Party also conducted a primary election on June 3. Petitioner

Graddick, respondent Baxley, and three other individuals were candidates for the Democratic Party's 1986 gubernatorial nomination. Graddick is the Attorney General of Alabama; Baxley is the Lt. Governor.

Baxley finished first in the June 3 primary. Graddick finished second. Because neither candidate won a majority, a runoff election between Graddick and Baxley was held on June 24. Graddick won the June 24 runoff by 8,567 votes, or 0.6 percent of the almost one million votes cast.

Petitioners Curry and Farnell, and the class they represent, lawfully voted for Graddick in the June 24 runoff election. Some voters who had participated in the June 3 Republican primary crossed over and voted in the June 24 Democratic runoff, in violation of the Crossover Provision. In addition, some voters who had promoted the candidacies of independent candidates during 1986 voted in

the June 24 Democratic runoff, in violation of the Independents Provision.

On June 28, respondents Kenneth Pike and Nellie Pike filed with the SDEC a contest of the results of the June 24 runoff. They claimed that "approximately 20,000 voters" who had participated in the initial Republican primary on June 3 had crossed over and voted in the Democratic runoff on June 24. They also alleged that they were "of the opinion that at least 80 percent" of such voters had cast their ballots for Graddick on June 24. They requested that the SDEC disqualify those votes and declare Baxley the winner of the runoff election. On June 30, respondent Baxley filed a similar contest with the SDEC. (The contests described in this paragraph are hereinafter referred to as the "Contests.")

Contests of primary elections before the SDEC are authorized and governed by Sections 17-16-70 through 17-16-89 of the Alabama Code. On June 30, acting pursuant to

Section 17-16-85, respondent Baker appointed a subcommittee of the SDEC (the "Subcommittee") to hear the Contests. Baker named himself Chairman of the Subcommittee.

On July 11, respondents Jerry Henderson and Dejerilyn Henderson commenced an action against Graddick in the United States District Court for the Middle District of Alabama, Henderson v. Graddick, Civil Action No. 86-H-680-N. Respondent Baker and the SDEC were named as nominal defendants. The Hendersons alleged that Graddick had violated Section 5 of the Voting Rights Act of 1965 by interfering with the enforcement of the Crossover Provision. Pursuant to Section 5, a three-judge court was convened to hear the action.

The Hendersons also claimed that, because of the alleged Section 5 violation, a sufficient number of illegal crossover votes had been cast for Graddick to change the outcome of the June 24 runoff. The plaintiffs

presented evidence based on pre-election polls purporting to show the number of people who had voted in both the June 3 Republican primary and the June 24 Democratic runoff and purporting to show how many of those people had voted for each of Graddick and Baxley.[1/] On the basis of that evidence, the Hendersons asked the court to set aside the June 24 election and to certify Baxley, the loser of that election, as the winner.

The three-judge court ruled that Graddick had violated Section 5 and could not be certified as the Democratic Party's nominee on the basis of the June 24 runoff. But the court declined to certify Baxley as the nominee. The court stated that, on the basis of the evidence presented, "[i]t has been impossible for this Court to determine precisely how many crossover votes were cast, and

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1/ This evidence is described at pp. 15-22, infra.

of course it is impossible to know how many of these were cast for Mr. Graddick and how many for his opponent, Mr. Baxley." Henderson v. Graddick, No. 86-H-680-N, slip op. at 10 (M.D. Ala. Aug. 1, 1986). The court also stated that it wanted to ensure that Alabama voters decided the outcome of the election and that there could be no "'lurking suspicion'" that anyone other than the voters had done so. Id. at 27. Accordingly, the Henderson court enjoined Baker and the SDEC "to order a new runoff election between Mr. Graddick and Mr. Baxley unless the Democratic Party determines pursuant to its procedures and the stringent rules under Alabama law for an election contest that Mr. Baxley received the majority of the legally cast votes in the June 24 runoff." Henderson v. Graddick, No. 86-H-680-N, order at 2 (M.D. Ala. Aug. 1, 1986).

Following the entry of the Henderson order, the Subcommittee, on behalf of the

SDEC, held hearings in the Contests. In attempting to prove the number of crossover voters and the candidate for whom they voted, the contestants presented essentially the same polling evidence as that presented in Henderson.[2/]

On August 15, the Subcommittee, on behalf of the SDEC, issued its decision. The Subcommittee stated that "[t]he evidence concerning the exact number of illegal votes and the exact manner of each vote is conflicting. It certainly would be impossible in a statewide election to make this determination to a mathematical certainty." Subcommittee Statement at 7. Nevertheless, the Subcommittee stated that it was "satisfied" that "thousands of illegal votes [were cast] in favor of Graddick and that Baxley received the majority of the legal votes cast." Id. at 7.

2/ This evidence is described at pp. 15-22, infra.

The Subcommittee declared Baxley the Democratic Party's gubernatorial nominee and directed Baker to certify the nomination to the Alabama Secretary of State. Subcommittee Order at 1.

On August 29, petitioners Curry and Farnell, individually and as representatives of a class of people who legally voted for Graddick in the June 24 runoff, filed an action under 42 U.S.C. § 1983 in the United States District Court for the Northern District of Alabama. They asserted that, in certifying Baxley, respondents Baker and the SDEC had violated their rights under the due process clause of the Fourteenth Amendment, depriving them of the right to vote and have one's vote counted, the rights of free speech and association, the right to petition for redress of grievances, and the right to protection from arbitrary application of statutes and rules. Curry and Farnell requested a declaration that the SDEC's certification of Baxley was null and void and an injunction

requiring the SDEC to conduct a new runoff election between Graddick and Baxley.

On September 2, petitioner Graddick filed a similar action in the Northern District of Alabama. Graddick asserted that, in certifying Baxley, Baker and the SDEC had violated his due process rights, depriving him of the right of access to the ballot, rights of free speech and association, right to petition for redress of grievances, and right to protection from arbitrary application of statutes and rules. Graddick sought essentially the same relief as that requested by Curry and Farnell.

On September 5, upon Graddick's motion, the District Court consolidated the two actions. The court also granted motions to intervene filed by respondents William Baxley, Kenneth Pike, Nellie Pike, Jerry Henderson, and Dejerilyn Henderson.

On September 17, the District Court entered its memorandum opinion and initial

order. The court held that, by certifying Baxley on the basis of insufficient, pre-election polling evidence, the SDEC had violated petitioners' due process rights:

> By changing the election results without evidence [the SDEC] has violated the due process clause of the fourteenth amendment by undermining the fundamental fairness of the electoral process, necessitating court intervention. Its transactions in disenfranchising voters cannot be tolerated.

Mem. Op. at 52a.3/

In its memorandum opinion, the District Court discussed at length the evidence presented in the SDEC Contests. See id. at 22a-40a. The court described the estimates and extrapolations offered by the contestants to show the total number of crossover voters. See id. at 28a-29a. The contestants used voting records from 13 sample counties,

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3/ Citations to specific pages of the opinions and orders of the courts below refer to pages in the appendix of this petition.

arrived at a claimed crossover percentage for those counties, and then applied that percentage to other counties and to illegible voting records. See id. By analyzing voting information from a county not sampled by the contestants, the court found that the contestants' application of the same crossover percentage to all counties was unsound. Id. at 31a. The court observed: "None of the 'experts' made any similar analyses; yet they presumed to opine that their sample precincts were 'typical.' Such an opinion is not worthy of belief." Id. at 30a-31a. The court concluded that the SDEC had not determined the number of "'illegal'" crossover votes. Id. at 22a.

The District Court also described the opinion testimony offered by the contestants to show how many of their estimated number of crossover voters had cast their ballots for Graddick. See id. at 22a-29a. One expert, Dr. Davis, testified that in the

weeks before the runoff she had identified a subsample of 90 crossover voters. Id. at 22a-23a. She testified that 83.5 percent of those voters said they planned to vote for Graddick, and she claimed that the same percentage of all crossover voters would vote for Graddick. See id. at 23a-24a. The court evaluated this testimony as follows:

> [Dr. Davis] indicated the results would fall within a 7.6 per cent range on either side of 83.5 per cent, 95 out of every 100 times. Within this range, either Baxley or Graddick could have won. With such an extremely small number, the reliability of her poll is highly suspect. Dr. Davis had no idea if any of those interviewed had been interviewed more than once. Duplications would increase the range and further reduce the reliability. She did not know how the people actually voted; she made no exit or follow-up polls to determine if the results had fallen within her range. It is unsound to invalidate an election, even if it is constitutional to do so, using such a small sample, especially when much of the sampling was done weeks before the election.

Id. at 24a (emphasis added).

The contestants' second expert, Dr. Ingram, "opined that 88 to 90 per cent of Republicans interviewed during the same time

period as that used by Dr. Davis indicated a preference for Graddick." Id. at 24a-25a. Ingram testified that "on the basis of his polls he would be surprised if Graddick got less than 90 per cent of the Republican vote." Id. at 25a. The court pointed out a crucial flaw in this evidence: Ingram polled and testified about only Republican voters, rather than crossover voters; many of his Republican voters did not vote in the June 3 Republican primary and therefore could not have been illegal crossover voters on June 24. Id. The court stated its evaluation of Ingram's evidence:

> He made no effort to measure the cross-over vote and admitted that two-thirds of the persons who called themselves Republicans did not vote in the Republican primary on June 3, 1986, and were not crossovers. He did not in his survey ever attempt to measure the opinions of crossover voters, and it is crossovers who are central to the contest before the Subcommittee.

Id.

The contestants' final expert, Dr. Henderson, conducted "regression analysis" of

the election results. Id. at 26a-27a. The court stated its evaluation of Dr. Henderson's testimony:

> He repeatedly stated that the analyses showed almost 100 per cent of the Republican vote went to Graddick on June 24. When specifically asked if he had determined the number of crossover votes, however, he stated he had "not been able to determine that." It is the specific number of votes cast on June 24 that is determinative. The will of the people cannot be circumvented by anything less, and the court cannot accept Dr. Henderson's testimony when he continues to espouse the theory that almost 100 percent of the Republicans voted for Graddick.

Id. at 27a.

The District Court also found that, while the SDEC's Subcommittee purported to disqualify votes cast for Graddick in violation of the Crossover Provision, the Subcommittee failed to disqualify votes cast for Baxley in violation of the Independents Provision. Id. at 38a, 50a-51a. The contestants' own expert testified that such an adjustment would have cost Baxley 1,222 votes -- enough to give Graddick the majority of the

"legal" votes cast in the runoff, even on the basis of the contestants' projections on crossover voting. Id. at 38a, 51a. The court stated:

> None of the experts made adjustment for independents or for those voters who signed a petition for a Montgomery County independent candidate and of whom 97 per cent (according to Davis) cast their ballots for Baxley in the runoff. Davis admitted this adjustment would reduce Baxley's vote by 1,222. Nor did the Subcommittee make such an adjustment.
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> . . . .
>
> Certainly the State Democratic Executive Committee cannot apply its rules and Alabama statutes in invalidating votes cast for Graddick if it does not apply those same rules and statutes to the votes cast for Baxley. . . . The Committee did not apply its own rules and invalidate [the Montgomery County votes cast in violation of the Independents Provision], nor did the Committee make any finding of the number of independent votes which were cast. Dr. Davis testified that a proper finding would be to reduce Baxley's total by 1,222. This reduction, together with a finding that Graddick got 83.5 per cent of the crossovers [as Dr. Davis testified], would show Graddick to have legally won the election.

Id. at 38a, 50a-51a.

The District Court summarized the evidence presented in the Contests as follows:

> The Committee has never given a numerical count of the number of votes cast for each candidate or the total number cast. With no real evidentiary basis for its decision, the Committee determined that thousands of illegal votes were cast in favor of Graddick and that Baxley had received the majority of the legal votes cast. The Subcommittee did not give the numbers of legal votes received by the candidates nor did its decision explain the reasoning which led to the proclaimed result. This arbitrarily discriminatory decision was based on the opinions of pollsters, . . . which opinions were not validated by appropriate and sufficient statistical evidence. Not only was there a wide variance in the results of the polls relied upon, but the sampling of the citizenry polled was limited.
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> . . . .
>
> Regardless of how many polls or analyses were run, the incontrovertible conclusion is that no one knows to a certainty how the voters cast their ballots. Not one voter testified as to his or her actual vote, and no one used investigative polling techniques to inquire into votes actually cast.

Id. at 22a, 38a-39a.

The District Court observed that it had been "unable to find a single precedent which allowed election contest results to be

based solely on the opinions and guesses of pollsters." Id. at 39a. And the court said that it could not allow the June 24 runoff election to be determined on that basis:

> Regardless of whether polling or more accurate regression analysis was used, this court cannot allow the results of an election to be determined on the polled intentions of a small segment of the population in which even a few duplications could greatly distort the findings, or upon a mathematical formula in which the hypothesis is based on anything other than 100 per cent of the boxes in the state.

Id. at 36a-37a.

Accordingly, the District Court held:

> The decision of the Subcommittee of the State Democratic Executive Committee to base an election result on this inconclusive speculation can only be classified as an arbitrary, capricious action, amounting to a denial of due process. The fundamental rights of voting and access [t]o the ballot cannot be denied without substantial certainty. Accordingly, this court rules:
>
> (1) The State Democratic Executive Committee cannot overturn an election on the basis of polling data, and
>
> (2) Even if the Committee could overturn an election on the basis of polling data, it could not do it on the

basis of the inaccurate polling data used here.

Id. at 40a; see id. at 52a (quoted supra at p. 15.

On September 18, the District Court entered its final order.4/ The court declared the SDEC's certification of Baxley null and void and ordered the SDEC "to conduct a new runoff primary between Charles D. Graddick and William J. Baxley as soon as possible." Sept. 18 Order at 74a-76a.

4/ In its September 17 order, the District Court directed Graddick to file his written consent to an injunction requiring him to abandon his independent, write-in campaign. Sept. 17 Order at 59a-60a. (Graddick had commenced a write-in campaign as an independent candidate after the SDEC certified Baxley as the Democratic Party's nominee.) The court further ruled that if Graddick were to consent to such an injunction, it would declare the SDEC's certification of Baxley null and void and order that a new runoff between Graddick and Baxley be held as soon as possible. Id. at 59a. On September 18, Graddick filed his consent.

On September 18, the Eleventh Circuit the enforcement of the District Court's initial order. On September 19, the Eleventh Circuit stayed the enforcement of the District Court's final order.

On October 1, the Eleventh Circuit issued its opinion reversing the District Court.5/ The court ruled that the voters and Graddick had suffered no constitutional deprivation as a result of the Subcommittee's decision to award the election to Baxley. The court began by noting that federal courts have limited jurisdiction in state election contests. The court found that that jurisdiction is limited to scrutinizing laws infringing on the rights of voters, and that it does not extend to scrutinizing the validity of the

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5/ Before oral argument, petitioners filed a motion to disqualify Judge Vance from the Eleventh Circuit panel, on the ground that he had previously been Chairman of the Alabama Democratic Party. That motion was denied.

ballots cast. It said that only in extraordinary circumstances, where there was persistent and fundamental unfairness, should federal courts intervene. After reviewing several cases, the court concluded that this case was more analogous to a "garden variety" election contest or a dispute over the accuracy of a ballot count. Although the nature of the evidence presented in the SDEC's hearings is central to the issues in this action, the Eleventh Circuit criticized the District Court for becoming engulfed in that evidence. The Eleventh Circuit concluded that there were adequate state procedures to review the issues in this case. Op. at 120a-137a.

The court went on to hold that a compelling state interest was served by the Subcommittee's reliance on pre-election opinion polls to decide the election. The court found that, because of the massive nature of the voting irregularities, making a ballot-by-ballot determination of how the

illegal voters voted was impractical. The court noted that the illegal winner and his supporters had a right to have the results of the first runoff election stand, if possible. Under these circumstances, it found that a valid and compelling state interest was served by allowing the use of polling and statistical data, which it noted had been admitted in other circumstances for other purposes. The court rejected the holding of the District Court that the result of the runoff election could not be determined on the basis of the pre-election polls presented in the Contests. Op. at 137a-144a.

Alabama's general election is scheduled for November 4, and several weeks of preparation are necessary before a new runoff election can be held. To prevent disruption of those preparations, petitioners sought from the Eleventh Circuit a stay allowing the preparations to go forward. On October 2, the Eleventh Circuit denied that application. On

October 3, petitioners applied to Justice Powell for a stay of the Eleventh Circuit's order pending this Court's decision. Petitioners have also moved this Court for expedited consideration of this petition.

In a related case, petitioner Graddick has filed a jurisdictional statement appealing from the order of the three-judge court in Henderson, which ruled that Graddick had violated Section 5 of the Voting Rights Act. Graddick has also sought expedited consideration of that appeal.

REASONS FOR GRANTING THE WRIT

For the first time in our nation's history, a state political party has set aside the results of an election and has certified the loser as the winner based on the predictions of experts relying on pre-election polls. In that sense this is a unique case; a precisely analogous set of facts is unlikely to reoccur. But this case is also important and appropriate for consideration by this

Court for two reasons. First, unless the Court acts, the next Governor of Alabama is likely to be the choice of a handful of politicians who responded to the opinions of pollsters, rather than the choice of the majority of the voters. Second, this case presents issues that may well reoccur concerning the role of the federal courts in state elections and the appropriateness of using polling evidence to decide the outcome of contested elections. If the Eleventh Circuit's opinion is allowed to stand, it will be a dangerous precedent that denigrates the right of voters to have their votes counted and endorses the use of polls to decide disputed election results.

The Eleventh Circuit's opinion is a peculiar document. It is written with a perceptible attitude of displeasure toward petitioner Graddick. In some places it is inaccurate about important facts. Perhaps most glaringly, it accuses Graddick of

obtaining an ex parte order from a state judge to prevent the Democratic Party from obtaining from Republican county chairmen records it needed for its election contest. Op. at 101a. In fact, that order was obtained by one of the Republican county chairmen, and Graddick was not even a party to the action. That misstatement and others like it are examples of the displeasure with Graddick that permeates the Eleventh Circuit's opinion.6/

Petitioners believe that the origin of this displeasure is the opinion in the companion case, Henderson v. Graddick. In that case, a three-judge district court, holding that Graddick had violated Section 5 of the Voting Rights Act, made findings of fact that simply were not supported by the

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6/ It is particularly puzzling that such a mistake was made, since one member of the Eleventh Circuit panel was also a member of the three-judge district court in the companion Henderson case.

record. For example, the court found that Graddick caused "massive" numbers of persons who had voted Republican in the first primary election to cross over and vote in the Democratic primary runoff election, despite the fact that evidence offered by the plaintiffs in that case -- Graddick's opponents -- showed that most of the voters who crossed over had planned to do so before Graddick took any action. These "massive" numbers of cross-overs, inaccurately attributed to Graddick, are then cited repeatedly in the Eleventh Circuit's opinion. It seems fair to say that underlying the Eleventh Circuit's opinion is the attitude that Graddick got what he deserved. Otherwise it is difficult to explain why the Eleventh Circuit upheld the use of polling evidence to overturn an election, but made no attempt, in reversing the District Court's finding that reliance on that polling evidence was arbitrary and capricious, to

explain why the District Court's findings about that evidence were wrong.7/

Petitioners submit that Graddick's actions were in fact legal and that at a minimum be acted in good faith. But even if petitioners are wrong, it is the rights of Alabama voters that are paramount. Displeasure with Graddick's actions cannot justify establishing a precedent that undermines the rights of voters to have their votes

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7/ It is because the issues in this case are so intertwined with the issues of the Henderson case that petitioners have filed this petition for a writ of certiorari on the same day that the Henderson jurisdictional statement is being filed. The jurisdictional statement raises substantial issues about the three-judge district court's interpretation of Section 5 of the Voting Rights Act. Because the remedy petitioners seek is a new election, petitioners also have moved this Court to give the petition and the jurisdictional statement expedited consideration. The general election is less than one month away. Even if it were postponed, there is little time left before the term of the incumbent Governor expires on at the end of the year.

counted and justifies substituting the opinions of pollsters for the votes of voters.

I. THE ELEVENTH CIRCUIT'S RULING THAT THERE WAS NO DEPRIVATION OF THE RIGHT TO VOTE IS INCONSISTENT WITH THE HOLDINGS OF OTHER COURTS

The Eleventh Circuit held that the SDEC's use of polling data to determine the winner of the runoff election did not deprive petitioners of a right "'secured by the Constitution and laws.'" Op. at 124a. (quoting Baker v. McCollan, 443 U.S. 137, 140 (1979)). In reaching this conclusion, the court divided the federal court cases involving state election disputes into two distinct types: (1) "'garden variety' election dispute[s], which [do] not rise to the level of a constitutional deprivation," Op. at 129a, and (2) cases involving "patent and fundamental unfairness," Op. at 127a, in which federal intervention is not only appropriate but necessary. The Eleventh Circuit then

erroneously classified this case as "garden variety."

This Court has never established guidelines for when it is appropriate for federal courts to intervene in state elections to protect the constitutional right to vote. Petitioners believe that the Eleventh Circuit's mistaken classification of this election dispute as "garden variety" demonstrates the pressing need for such guidelines.

The "garden variety" election dispute cases to which the Eleventh Circuit compared this case are in fact very different from this case. All of those cases involved mechanican or technical breakdowns or disputes over the accuracy of the ballot counting process. This case, on the other hand, is more similar to cases in which a state decides not to count the vote or not to hold an election but instead decides to replace the electoral process with a process of appointment.

To step back for a moment, it is breathtakingly wrong to call this case a "garden variety" election dispute. At stake is the question of who will most likely be Alabama's Governor for the next four years, since the Democratic nomination has been tantamount to election in Alabama for more than 100 years. For the first time in our history, a political party has decided an election on the basis of pre-election opinion polls -- and unreliable polls at that. Already this "garden variety" dispute has generated two federal cases -- with three full written opinions on the merits -- a state election contest whose hearings lasted almost one week, and numerous rulings from Alabama's state courts, including the Alabama Supreme Court. The issues involved in no way compare with the mundane, technical issues raised in the five so-called "garden variety" dispute cases on which the Eleventh Circuit relied.

Gamza v. Aguirre, 619 F.2d 449 (5th Cir. 1980), involved an inadvertent error arising out of the distribution of the wrong punchcard ballot to some voters in a few districts. The Fifth Circuit was content to let the state electoral procedures determine how to remedy this inadvertent error. Johnson v. Hood, 430 F.2d 610 (5th Cir. 1970), concerned an election commission's decision to reject ten ballots in a county constable race. No deliberate discrimination was alleged, and the Fifth Circuit decided not to second guess the ministerial operations of the election commission. Pettengill v. Putnam County School District, 472 F.2d 121 (8th Cir. 1973), concerned issues such as whether residency and age requirements were met. Welch v. McKenzie, 765 F.2d 1311 (5th Cir. 1985), concerned irregularities in delivering, and possible errors in counting, ballots for a county supervisor's post. Hennings v. Grafton, 523 F.2d 801 (7th Cir. 1975), involved

malfunctions of electronic voting devices that could have affected only one race -- and then only if the loser obtained highly improbable percentages of the miscounted votes. In these cases, the courts declined jurisdiction because no federally protected right was affected.

Obviously the federal courts cannot become involved in conducting recounts of every county election where a losing candidate alleges that a mistake has been made. On the other hand, the federal courts do have a role to play in cases like this one, where the issue is not mechanical or technical errors, but rather a decision more analogous to refusing to count the votes or refusing to hold an election. In that connection, the Eleventh Circuit's ruling that no deprivations of federally protected rights are involved here conflicts with the rulings in election cases decided by two other Courts of Appeals and one state Supreme Court.

Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978), arose out of a Rhode Island primary in which voters were permitted to vote by absentee or shut-in ballots. Following the election, the Rhode Island Supreme Court ruled that absentee and shut-in ballots were not permitted in primary elections and invalidated about ten percent of the ballots. The loser was then certified the winner.

In the instant case, crossover voters, like the absentee and shut-in voters in Griffin, had their votes disqualified after the election. Unlike the situation in Griffin, where it was possible to determine with mathematical certainty who the winner was once the disqualified votes were eliminated, in this case that determination could be made only by guessing. But even in Griffin the correct remedy was to hold a new election:

> [T]he interest of the state in the proper interpretation of its laws, and the interest of the voters, can both be accommodated by the relatively simple expedient of holding a new primary.

570 F.2d at 1076.

In fact, the "broad-gauged unfairness," id. at 1078, that mandated the result in Griffin is even stronger in this case. Whereas the election officials in Griffin accidentally assured voters that they could legally cast absentee and shut-in ballots, the SDEC's post-election decision to substitute opinion polls for counting the ballots was an intentional, post hoc stripping away of the right to vote from all legal voters. The use of polls to determine a winner renders the voters' trip to the election booth a meaningless exercise. When it decided to rely on polling evidence to select its nominee, the SDEC simply disregarded the votes cast by petitioners and all other voters. Even those runoff voters who cast their ballots for Baxley have not had their votes counted, and hence cannot be certain if their candidate is the rightful nominee. Therefore, both in terms of its intentional nature and its impact on the right

to vote, the SDEC's decision to rely on polls to select a party nominee amounted to "broad-gauged unfairness."

Duncan v. Poythress, 657 F.2d 691 (5th Cir. Unit B 1981), cert. denied, 455 U.S. 937, cert. dismissed, 459 U.S. 1012 (1982), like this case, involved an attempt by politicians to substitute their will for that of the people. In Duncan, the Governor of Georgia and a Georgia supreme court justice conspired to prevent a special election that was required by law. Instead of holding the election, the Governor appointed his own choice to fill a vacancy on the state's highest court. Georgia voters successfully brought a federal action challenging the Governor's appointment and claiming that the failure to hold an election deprived them of the constitutional right to vote. The Fifth Circuit affirmed the district court's order to hold a special election and its invalidation of the Governor's appointment. The court observed:

> The Georgia voters may complain of a far more serious legal wrong than that established in Griffin and contemplated in Gamza because the entire state electorate has been deprived of the right to participate in an election. The district court stated that it "can conceive of no more fundamental flaw in the electoral process than the deprivation of the right to vote altogether." We likewise can imagine no claim more deserving of constitutional protection than the allegation that state officials have purposely abrogated the right to vote, a right that is fundamental to our society and preservative of all individual rights. . . . It is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law so that they may fill the seats of government through the power of appointment.

657 F.2d at 703-704.

The actions of the SDEC erode the democratic process in the same way. Both cases are about an appointment made by politicians at the expense of the voters' right to have their ballots counted. Granted, Georgia voters never went to the polls, while the Alabama voters went through the motions of voting only to have their ballots tossed aside. But in both cases, the end result is a constitutional deprivation of the right to vote

because of the overreaching of politicians. The Fifth Circuit, citing Griffin, ordered a special election to remedy the Governor's actions. The Eleventh Circuit should have followed suit and ordered a new runoff to restore both the right to vote to Alabama voters and integrity to the state's electoral process.

Perhaps the case most analogous to the case at bar is a state case, Akizaki v. Fong, 51 Hawaii 354, 461 P.2d 221 (1969). In that case, one candidate for the Hawaii House of Representatives defeated his opponent by two votes. The loser contested the election and proved that 19 absentee ballots had been improperly cast. But those 19 ballots had been intermingled with all other absentee ballots so that it was no longer possible to identify them or to tell for which candidate they were cast. If all the absentee ballots, both legal and illegal, were excluded, then the loser became the winner.

Although not explicitly grounded on the federally protected right to vote, the fundamental interest identified by the Hawaii Supreme Court was virtually identical to the rights protected by the federal constitution:

> The fundamental interest to be protected here is that of the people . . . in choosing whomever they please to represent them . . . . The right to vote is perhaps the most basic and fundamental of all the rights guaranteed by our democratic form of government. Implicit in that right is the right to have one's vote count . . . .

461 P.2d at __. The court went on to hold that a new election should be ordered:

> Because of the commingling of the valid and invalid absentee ballots, there is simply no way to determine what the actual result of the election was, and who should therefore be declared the winner.

461 P.2d at __.

The same result should obtain in Alabama in 1986. Because there was no way to determine who the winner was, the federally protected right of voters to have their votes counted compels that a new election be held.

Although the precise facts of this case are unlikely to reoccur, similar issues will undoubtedly arise. For example, if there is a case involving a conspiracy to stuff ballot boxes, so that the vote cannot be accurately counted, should the right of the voters to have their votes counted compel a new election, or should a political party simply guess who won? The Eleventh Circuit's opinion, in contrast to the First Circuit in Griffin, the Fifth Circuit in Duncan, and the Hawaii Supreme Court in Akizaki, says that no federally protected right is affected and that it is therefore permissible to guess. Petitioners submit that this Court should resolve the issue.

II. IN RULING THAT THERE WAS A COMPELLING STATE INTEREST SERVED BY RELIANCE ON POLLING DATA, THE ELEVENTH CIRCUIT FAILED TO APPLY THE LEAST RESTRICTIVE MEANS TEST

The Eleventh Circuit ruled that Alabama's compelling state interest in ensuring honest and fair elections and preserving

the rights of its voters and political parties was served by relying on polling evidence to decide a contested election. Op. at 140a-143a. In reaching its conclusion, however, the Eleventh Circuit ignored the well-established jurisprudence of this Court that when there are several methods of achieving a state interest, the state must use the one that has the least drastic effect on constitutionally protected rights -- the least restrictive means. Rather than considering the least restrictive means available in this case, the Eleventh Circuit set up a false dichotomy. It implicitly assumed that the only two ways in which the state's interest could be preserved were by a ballot-by-ballot analysis or by reliance on polling evidence. It gave no serious consideration to a far less restrictive means of serving the state's interest, i.e., holding a new runoff election, as ordered by the District Court. In the process, the Eleventh Circuit has permitted

hundreds of thousands of voters to be disenfranchised and has set a dangerous precedent, all of which warrant this Court's review.

The electoral franchise is recognized as a fundamental right protected by the United States Constitution. Reynolds v. Sims, 377 U.S. 533, 554-55, 561-62 (1964). With this status, the right to vote cannot be infringed except to further a compelling state interest. Dunn v. Blumstein, 405 U.S. 330, 335-36 (1972); Williams v. Rhodes, 393 U.S. 23, 31 (1968). The Eleventh Circuit properly identified the state's interest here to be "insuring honest and fair elections and preserving the rights of its voters and political parties." Op. at 137a. Yet the Eleventh Circuit failed to give any serious consideration to a crucial element in the strict scrutiny analysis: the least restrictive means test.

As this Court has observed, "a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest." Kusper v. Pontikes, 414 U.S. 51, 58 (1973). Finding unconstitutional an election rule that barred voters from voting in one party's primary within 23 months of participating in another party's primary, the Court in Kusper said: "[i]f the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." Id. at 59.

Similarly, in Kramer v. Union Free School District, 395 U.S. 621 (1969), this Court found that a state law limiting participation in school board elections to landowners and parents of students violated the equal protection clause of the Fourteenth Amendment. The voting classifications there, taking in many persons with only remote interests in the

public schools and excluding persons with direct interests, were not precisely tailored to serving the state's interest in limiting the franchise to those primarily interested in the schools. Id. at 632.

In this case, the Eleventh Circuit made a bare assertion that the SDEC subcommittee "adopted the only practical approach available to it" to protect the fairness of the electoral process when it used pre-election polling data to determine the party's gubernatorial nominee. Op. at 143a. The court barely considered the alternative of holding a new runoff, insisting that such a course would violate the rights of both the candidate who received the most lawfully cast votes and the voters who supported the "rightful victor." Id. at 138a. The Eleventh Circuit's reasoning, however, has a fatal flaw. The closeness of the June 24 runoff and the uncertainty over exactly how many crossover votes were cast, and for whom, make it

impossible to know which candidate actually garnered the most lawfully cast votes.

The Subcommittee's use of polling data to choose the party's nominee caused exactly the harm that the Eleventh Circuit said the state has an interest in preventing. Far from ensuring an honest and fair election, the Subcommittee's action effectively abrogated the election process, replacing it with nomination by sample polling. And the voters certainly did not have their rights preserved by having their votes put aside in favor of pre-election polling data.

The Eleventh Circuit's assertion that polling data would be a "practical approach" to determining the winner of an election, when the results have become uncertain, flies in the face of reality. It is important to note that in a 39-page opinion the Eleventh Circuit never discussed the quality of the polling evidence received by the Subcommittee except to assert that it was

sufficient and that reliance on it does not shock the conscience. Op. at 143a. The District Court, in contrast, set forth in detail what the polling evidence was and why it was insufficient. While the District Court digressed into discussions of Alabama voting trends not grounded in the record, which the Court of Appeals criticized, its basic analysis of this evidence is clearly supported by the record and is not disputed by the Eleventh Circuit. The District Court concluded after a lengthy analysis of the evidence that it was "inconclusive speculation" and that reliance on it could only be classified as "an arbitrary, capricious action." Mem. Op. at 40a.

More specifically, the polling evidence disclosed that, within the margin of error for the one poll introduced by the contestants to predict for whom the crossovers voted, either candidate could have won the election. At a minimum, therefore, this

polling evidence cannot be relied upon to call the election.

Indeed, counsel for the party Subcommittee revealed that the Subcommittee was not in fact relying solely on this polling evidence but also was making a determination "'of which candidate will best serve the party as a standard bearer in the general election.'" Dist. Ct. Mem. Op. at 52a-53a. Thus, the Subcommittee was not just basing its decision on polls; it was substituting its judgment for the will of the electorate, even though the party had told the electorate that it would select its nominee through a primary election.

It is questionable whether polling evidence can ever be relied upon to decide an election. Starting with the famous Dewey-Truman election in 1948, in almost every election year there have been major upsets, not predicted by the polls and not within the polls' margins of error. Recent examples

include: (1) Mitchell McConnell's 1984 upset of incumbent Kentucky Senator Walter Huddleston. New York Times, Nov. 7, 1984, Sec. A, P. 25. (2) George Deukmejian's defeat of Tom Bradley in the 1982 California gubernatorial race, an outcome not anticipated by opinion polls. New York Times, Nov. 4, 1982, Sec. A, p. 22. (3) Frank Lautenberg's defeat of the favored Millicent Fenwick in the 1982 New Jersey Senatorial race. One poll forecasted that Fenwick would win by 18 percentage points. New York Times, Nov. 4, 1982, Sec. B, p. 15. (4) Charles Grassley's upset of incumbent Senator John Culver in Iowa in 1980. Pre-election polls showed Culver ahead by five percentage points; he received only 46 percent of the vote to Grassley's 54 percent. New York Times, Nov. 5, 1980, Sec. A, p. 22. (5) Incumbent Iowa Senator Dick Clark's 1978 loss to Roger Jepsen. The Iowa Poll the Sunday before the election showed Clark winning by ten percentage points. The Washington Post,

Nov. 9, 1978, Sec. A, p. 3. (6) Harry Hughes's 1978 primary victory in the Maryland gubernatorial campaign. The Washington Post, Nov. 8, 1978, Sec. A, p. 1. (7) Thomas McIntyre's loss as a 16-year incumbent to Gordon Humphrey in the 1978 New Hampshire Senatorial contest. Almost every major forecast picked McIntyre. The Washington Post, Nov. 9, 1978, Sec. A, p. 4. (8) Bill Clements's 1978 defeat of John Hill for Governor of Texas. Pre-election polls proved wrong, probably because of low turnout; not everyone who tells a pollster he is going to vote actually does. The Washington Post, Nov. 9, 1978, Sec. A, p. 2.

Clearly, the means selected here to vindicate the asserted state interest were not narrowly tailored to avoid unnecessarily infringing fundamental rights. Because "the rightful victor" cannot be determined from the uncertain results of the June 24 runoff, the scheduling of a new runoff between Graddick

and Baxley is the one solution that will satisfy the right of the voters to cast their ballots and have them counted.

By failing to apply the least restrictive means test, the Eleventh Circuit has stripped Alabama voters of their fundamental right to vote and to have that vote counted. The Eleventh Circuit has erroneously permitted the SDEC to replace the decision of those voters with the speculation of pollsters. This Court's consideration of this case is warranted because of its great public importance to the people of Alabama and because of the Eleventh Circuit's dangerous precedent in allowing the opinions of pollsters to substitute for the votes of the electorate.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court issue

a writ of certiorari to review the opinion of the Eleventh Circuit.

Respectfully submitted,

Hamilton P. Fox, III
[Counsel of Record]
Joseph A. Califano, Jr.
Dewey, Ballantine, Bushby
Palmer & Wood
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 429-2335

Counsel for Petitioners

Of Counsel:

Champ Lyons, Jr.
Coale, Helmsing, Lyons &
Sims, P.A.
150 Government Street
Suite 2000
Mobile, Alabama 36602
(205) 432-5521

Hobart A. McWhorter, Jr.
Walter J. Sears, III
Bradley, Arant, Rose & White
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

David B. Ellis
Eugene C. Copeland
Ellis & Copeland
610 Lurleen Wallace
Boulevard, North
Tuscaloosa, Alabama 35401
(205) 752-5538

October 6, 1986

APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

J. FRANK CURRY and DANIEL R. FARNELL, SR., on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 86-G-1617-S
JOHN BAKER, as Chairman of the Alabama State Democratic Executive Committee; and THE ALABAMA STATE DEMOCRATIC EXECUTIVE COMMITTEE,	)	
Defendants.	)	
		(CONSOLIDATED)
CHARLES D. GRADDICK,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 86-G-1626-S
JOHN BAKER, as Chairman of the State Democratic Executive Committee, and the STATE DEMOCRATIC EXECUTIVE COMMITTEE,	)	
Defendants.	)	

MEMORANDUM OPINION

The State of Alabama held its primary elections on June 3, 1986. In elections in which no candidate receives a majority of votes cast, runoffs are required. One such contest was the runoff for the governor's race in the Democratic Party between William J. Baxley, the Lieutenant Governor, and Charles Graddick, the Attorney General. The runoff was held June 24, 1986, at which time Charles Graddick received 470,051 votes and William Baxley received 461,295 votes.

An Alabama primary election contest may be instituted under the following statute:

> The contests of nomination by a party for office, other than a county office, may be instituted by any qualified elector of the state, or of the political subdivision, as the case may be, who belongs to that party and who legally participated in such primary election, upon the following grounds, which may be used separately, or else be joined in the same contest:
>
> (1) Malconduct, fraud or corruption
>
> . . .
>
> . . .

(4) On account of the rejection of legal votes;

(5) Offers to bribe, bribery, intimidation or other malconduct or misconduct calculated to prevent a fair, free and full exercise of the elective franchise;

(6) Miscalculations, mistake or misconduct in counting, tallying, certifying or canvassing which of itself alone or in conjunction with the giving of illegal votes or the rejection of legal votes, or any other ground, would, when everything is corrected, reduce the number of legal votes cast for the declared nominee down to or below those of some other candidate in that race.

Title 17-16-71. Grounds. Code of Alabama (1975). Language of this section substantially follows that of Title 17-15-1. Grounds of Contest. Code of Alabama (1975).

Alleging misconduct during the election by which Republican and independent voters crossed over and voted in the Democratic runoff election, in violation of election rules (section 17-16-14, Code of Alabama (1975) and the 1979 Democratic Party Rule Art. VII, Sec. 1(e), prohibiting

crossover voting), William Baxley and Kennith and Nellie Pike filed contests with the Democratic Executive Committee contesting the results. Following a hearing1/ the Committee reduced the number of legal votes cast for Graddick and determined that William J. Baxley received a majority of the legal votes cast in the race for governor. Certification to the Alabama Secretary of State followed.

In one of the ensuing suits, plaintiffs Jerry and Dejerilyn Henderson filed suit on behalf of all black citizens of Alabama who

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1/ Section 17-16-85, in its entirety, provides:
The state executive committee shall, upon the filing of a contest with the chairman, be called by such chairman to meet at a time not less than 10 days nor more than 20 days from the time of filing such contest for the purpose of hearing and determining the same, or, without calling the committee to meet, the chairman may appoint a subcommittee as herein provided for. In hearing election contests, party committees sit as courts of special or limited jurisdiction.
Perloff v. Eddington, 293 Ala. 277, 302 So. 2d 92 (1974).

on behalf of all black citizens of Alabama who voted in both the Democratic primary on June 3, 1986, and the Democratic gubernatorial runoff on June 24, 1986, seeking relief under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), for the actions of Charles Graddick in using his office to encourage crossover voting, defined as the practice by which people who voted in the June 3 Republican primary voted in the June 24 Democratic runoff.

In this case, Henderson v. Graddick, Civil Action No. 86-H-680-N, the United States District Court for the Middle District of Alabama, Northern Division, held that Charles Graddick had violated the provisions of the Votings Rights Act and enjoined the State Democratic Executive Committee and John Baker from certifying Graddick as the Democratic gubernatorial nominee, based on the results of the June 24, 1986, runoff. The State Democratic Executive Committee and John Baker were

new runoff election between Mr. Graddick and Mr. Baxley unless it could determine that pursuant to Alabama rules and law Mr. Baxley had received the majority of legal votes cast. In the event another runoff was necessary, the court outlined the procedure to be followed and retained jurisdiction to award any necessary relief.

The Henderson court focused attention on whether there was a change in the rules of the Democratic Party subject to preclearance under Section 5 of the Voting Rights Act.2/ The court did not determine that the Democratic Party rule violated the United States Constitution, feeling that the claim had no merit. It did not indicate that

---

2/ The Democratic party rule preventing crossover voting was precleared with the U.S. Attorney General pursuant to the Voting Rights Act.

the claim as to the nonenforcement policy of the rule by the Committee had been waived.3/

3/ Testimony was given by Ms. Lindblom, a former Executive Director of the Democratic Party, that after the change in party rules inserting this rule, 10,000 copies of it were printed and distributed throughout the state to probate judges, Democratic committee members, office holders, and the news media. In addition, the rule had been discussed on many talk shows in election years 1980, 1982, and 1984, and had been the subject of workshops conducted throughout the state. Not only did she testify that the Democratic Party's position had been consistent since the rule's adoption in 1979, she maintained that Mr. Graddick, as attorney general, was aware of the party rule.
Mr. Al Lapierre, Executive Director of the Alabama State Democratic Party, testified in his deposition that there had been no need for the Party to take any affirmative action in 1982 and 1984 to prevent crossover voting.
Participation in the Republican primaries had been limited in those years, and during that time there was no general solicitation of the crossover votes by Democratic candidates for statewide office. The actions of Mr. Graddick and his staff contributed to any confusion generated among the public.
Additionally, the polling officials had been intimidated by the Attorney General's opinion letter of June 22,
(Footnote Continued)

Following the federal court's decision, Mr. Graddick filed a motion for emergency relief with the same court on August 21, 1986. The motion was denied August 26, 1986.

In response to the election contests of Baxley and of Kennith and Nellie Pike to the Democratic Committee, Graddick obtained a temporary restraining order from Alabama Circuit Judge Jack Carl, enjoining the Committee from holding the hearings and forbidding Mr. Baxley from holding any discovery. The Alabama Supreme Court stayed the order and directed the circuit court to promptly issue a final order. With no explanation, the circuit court declared Mr. Graddick the lawful winner of the June 24 runoff. The Alabama Supreme Court reversed the circuit court's ruling,

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(Footnote Continued)
1986, threatening both civil and criminal penalties against anyone interferring with crossover voting on June 24.

holding that Mr. Baxley's action was timely filed, the hearings were timely commenced, the State Democratic Executive Committee was authorized to act through a subcommittee, and that the Democratic Party had exclusive jurisdiction to hear the contest.

Subsequent to the Alabama Supreme Court's ruling, the district court in Henderson concluded that the crossover voting constituted a change within the meaning of Section 5 of the Voting Rights Act which had not been precleared by the Attorney General of the United States or by the United States District Court for the District of Columbia. The subcommittee then proceeded to hear the contest, at the conclusion of which it certified Bill Baxley as the winner of the Democratic primary.

This case then was brought under 42 U.S.C. § 1983 and the due process and equal protection clauses of the fourteenth amendment

to the United States Constitution. 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Jurisdiction is conferred on the court by 42 U.S.C. § 1331 (jurisdiction for causes of action arising under the Constitution and laws of the United States), and 42 U.S.C. § 1343.

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States:
>
> (4) To recover damages or to secure equitable or other relief under any Act

> of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1343.

All parties have agreed to the stipulation of facts filed with the court and have agreed that the present action will be a final determination. Accordingly, the court has allowed intervention by the Pikes (Charles Kennith Pike & Nellie Kent Pike), the Hendersons (Jerry Henderson & Dejerilyn Henderson), and William J. Baxley pursuant to this agreement.

The stipulation states:

A. The undersigned counsel, on behalf of their respective clients, stipulate to the authenticity of the following, but do not stipulate as to their relevance or admissibility:

1. The transcript of the testimony and proceedings on July 14 and August 11, 12, 13, 14 and 15 before the Subcommittee of the Alabama State Democratic Executive Committee

in the contest of the election for the gubernatorial nomination filed by Charles Kennith Pike, Nellie Kent Pike, and William J. Baxley. ...

2. All exhibits admitted into evidence at the said contest proceedings. ...

B. The following facts are stipulated as true by the undersigned counsel, on behalf of their respective clients, but counsel do not stipulate as to their relevance or admissibility:

1. In the June 24, 1986, primary runoff election for the gubernatorial nomination of the Alabama Democratic Party, Graddick received 470,051 votes and Baxley received 461,295 votes.

2. The facts set forth in paragraphs 5,4/ 6,5/ 7,6/ 9,7/ 10,8/ 15,9/ 16,10/

4/ Paragraph 5 of the complaint reads: "Defendant John Baker ("Baker") is an individual residing in Montgomery County, (Footnote Continued)

(Footnote Continued)
Alabama. Baker is chairman of the Alabama State Democratic Executive Committee."

5/ Paragraph 6 of the complaint reads: "Defendant State Democratic Executive Committee ("SDEC") is the governing body of the Party, established under the laws of Alabama. The SDEC's principal office is in Birmingham, Alabama."

6/ Paragraph 7 of the complaint reads: "Article VII(1)(e) of the Alabama Democratic Party Rules provides:

Any person who (1) votes in any primary election of another political party, (2) participates in the nominating process of another party's candidate(s), or (3) promotes the candidacy of an independent candidate shall not be entitled to vote in the Primary Elections of the Democratic Party held in the calendar year in which such person does any of said prohibited act(s). Without limiting the foregoing, any person who votes in the first primary election of another political party shall not be entitled to vote in the Democratic Party's runoff Primary Election which follows such first primary election."

7/ Paragraph 9 of the complaint reads: "William J. Baxley ("Baxley") was a candidate for the Party's 1986 gubernatorial nomination. Graddick was also a candidiate for the party's 1986 gubernatorial nomination. In addition to Graddick and Baxley, there were several other candidates for the party's 1986

(Footnote Continued)

and 27,11/ of the complaint in Graddick v. Baker, CV-86-G-1626-S. ...

(Footnote Continued)
gubernatorial nomination."

8/ Paragraph 10 of the complaint reads: "Baxley finished first in the Party's June 3 gubernatorial primary. Graddick finished second. No candidate won a majority of the party's June 3 primary. Therefore, a runoff election between Graddick and Baxley was held on June 24, 1986."

9/ Paragraph 15 of the complaint reads: "On July 11, 1986, two Alabama citizens commenced an action against Graddick in the United States District Court for the Middle District of Alabama, Henderson v. Graddick, Civil Action No. 86-H-680-N. Baker and SDEC were also named as defendants."

10/ Paragraph 16 of the complaint reads: "The plaintiffs in Henderson alleged that Graddick had violated Section 5 of the Voting Rights Act of 1965 by interfering with the enforcement of the Crossover Provision. Pursuant to Section 5, a three-judge court convened to hear the action."

11/ Paragraph 27 of the complaint reads: "Pursuant to the Order, Baker and SDEC certified to the Alabama Secretary of State that Baxley is the party's nominee for governor."

3. On August 15, 1986, William J. Baxley was certified to the Alabama Secretary of State as the gubernatorial nominee of the Democratic Party. ...

C. The undersigned counsel, on behalf of their respective clients, stipulate that Exhibit 3 hereto is a true copy of the Opinion and order dated August 15, 1986, of the Subcommittee of the State Democratic Executive Committee referable to the contents described in paragraph A-1 above.

Dated September 4, 1986.

It is the action of the State Democratic Executive Committee in certifying William J. Baxley as the Democratic candidate, when he did not receive the majority of the votes cast, upon which suit has been brought. At issue is the constitutional right to vote. Does the due process clause of the fourteenth amendment offer protection against violations of state election laws that undermine the

election process, and does the conduct in this case pose a serious enough denial of this right to raise it to a constitutional level? The Fifth Circuit has previously held that "the due process clause of the fourteenth amendment prohibits action by state officials which seriously undermines the fundamental fairness of the electoral process." Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), rehearing and rehearing en banc denied 664 F.2d 291 (11th Cir. 1981).

It is well settled that voting is a fundamental right12/ which includes the right to vote in a primary election,13/ and to have

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12/ Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

13/ Smith v. Allwright, 321 U.S. 649, 660-662, 64 S. Ct. 757, 88 L. Ed. 987 (1944); United States v. Classic, 313 U.S. 299, 318, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941); cf. Bullock v. Carter, 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972).

that vote counted.14/ A voter has standing to sue for deprivation of that right.15/

Likewise, the first amendment rights of freedom to associate and to petition for redress of grievances and the concept of liberty in the due process clause of the fourteenth amendment provide candidates with a limited right of access to the ballot.16/ Thus, the right to appear on the ballot is integral to the right to vote and must be measured by the same tests of

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14/ Gray v. Sanders, 372 U.S. 368, 380, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963); United States v. Classic, supra; cf. Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50, 90 S. Ct. 791, 25 L. Ed. 2d 45 (1970).

15/ Gray v. Sanders, supra, 372 U.S. at 375, 83 S. Ct. 801; Griffin v. Burns, 431 F. Supp. 1361, 1363 (D.R.I. 1977) (implied).

16/ See Smith v. Cherry, 489 F.2d 1098, 1100 (7th Cir. 1973), cert. denied, 417 U.S. 910, 94 S. Ct. 2607, 41 L. Ed. 2d 214 (1974); Brisco v. Kusper, 435 F.2d 1046, 1052-54 (7th Cir. 1970).

constitutionality.17/ Candidates have standing to assert this right.18/ Williams v. Sclafani, 444 F. Supp. 906 (S.D.N.Y. 1978).

Undeniably, the court has a compelling interest in upholding the right to vote when the integrity of the electoral process has been jeopardized. No right is more precious in a free country than that of having a voice in government and in selecting those who represent us therein. "Other rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481 (1964). Interpretation of this constitutional right has extended it to include the right to participate in and vote in runoff elections. Griffin v. Burns, supra, at 1074,

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17/ See Williams v. Rhodes, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968).

18/ See Smith v. Cherry, supra; and Brisco v. Kusper, supra (implied).

1975 (1978) (citing Reynolds v. Sims, supra, at 561, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1963), which equated dilution of that vote with deprivation of the free exercise of franchise). The unquestionable right to have that vote counted, United States v. Mosely, 238 U.S. 383, 35 S. Ct. 904, 59 L. Ed. 1355 (1915), cannot be denied or destroyed by alteration of the results. Any restrictions placed on it strike at the heart of representative government. It is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters.

In overturning the election results of the June 24 runoff, the Democratic Executive Committee has diluted the results. It is this broad-gauged unfairness that the district court has been asked to remedy. In its opinion of August 15, 1986, the Subcommittee of the Alabama State Democratic Executive Committee stated:

> The evidence concerning the exact number of illegal votes and the exact manner of each vote is conflicting. It certainly would be impossible in a state-wide election to make this determination to a mathematical certainty.

In defending its action the Committee has asserted reliance on Article (VII(1)(e) of the Alabama Democratic Party Rules:

> Any person who (1) votes in any primary election of another political party, (2) participates in the nominating process of another party's candidate(s), or (3) promotes the candidacy of an independent candidate shall not be entitled to vote in the Primary Elections of the Democratic Party held in the calendar year in which such person does any of said prohibited act(s). Without limiting the foregoing, any person who votes in the first primary election of another political party shall not be entitled to vote in the Democratic Party's runoff Primary Election which follows such first primary election.

At no previous time since the "Rule's" adoption in 1979 has an election been

contested under it.19/ Graddick contends that the "Rule" has never been enforced by the Democratic Executive Committee. Regardless of whether the "Rule" has been precleared or whether, by not adhering to it, preclearance is necessary, the court questions whether the electorate was properly notified of the change. Arguably, the practice of allowing crossover voting resulted in its practice becoming part of the party's rules by which it would be bound. The established custom for Alabama Republicans, independents, or members of other parties has been to vote in the Democratic primaries, the results of which were almost always tantamount to election.

Had the Committee been able to determine with "mathematical certainty" the number of "illegal" votes cast by Republicans and independents, this matter would not be

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19/ See n.3.

before the court today. The Committee has never given a numerical count of the number of votes cast for each candidate or the total number cast. With no real evidentiary basis for its decision, the Committee determined that thousands of illegal votes were cast in favor of Graddick and that Baxley had received the majority of the legal votes cast. The Subcommittee did not give the numbers of legal votes received by the candidates nor did its decision explain the reasoning which led to the proclaimed result. This arbitrarily discriminatory decision was based on the opinions of pollsters, Dr. Natalie Davis, Dr. Gordon Henderson, and Dr. Jerry Ingram, which opinions were not validated by appropriate and sufficient statistical evidence. Not only was there a wide variance in the results of the polls relied upon, but the sampling of the citizenry polled was limited.

Dr. Davis, partner in the polling firm of Davis, Penfield and Associates, who

had trained primarily in the area of survey research-polling and who worked primarily in that field, testified that 1.7 per cent of the people polled planned to cross over and vote in the Democratic runoff.20/ Her conclusions were taken from a tracking poll conducted by her organization.21/ Based upon her definition of crossover, from the total sample of over 5,000 voters interviewed, she determined that 90 people would cross over on the 24th. Dr. Davis interpreted this to read 15,833 crossovers.22/ Of the 90 people she

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20/ Dr. Davis identified a "crossover" as one who voted in the June 3 Republican primary and planned to vote in the June 24 Democratic runoff.

21/ A tracking poll is a continuous polling over a given period of time when "x" number of people are interviewed each night. At the end of the designated period, the results of the series give a complete sample. In Dr. Davis's poll, from June 3 to June 24 her daily sample poll ranged from 400 to 600 in size.

22/ 1.7% of the total who voted on June 3.

identified as crossovers, 83.5 per cent indicated that they would vote for Graddick. She indicated the results would fall within a 7.6 per cent range on either side of 83.5 per cent, 95 out of every 100 times. Within this range, either Baxley or Graddick could have won. With such an extremely small number, the reliability of her poll is highly suspect. Dr. Davis had no idea if any of those interviewed had been interviewed more than once. Duplications would increase the range and further reduce the reliability. She did not know how the people actually voted; she made no exit or follow-up polls to determine if the results had fallen within her range. It is unsound to invalidate an election, even if it is constitutional to do, using such a small sample, especially when much of the sampling was done weeks before the election.

Dr. Jerry Ingram, Director of an academic research unit known as The Alabama Voice, who had conducted political polls for

the last seven years, opined that 88 to 90 per cent of Republicans interviewed during the same time period as that used by Dr. Davis indicated a preference for Graddick. Around June 18 a trend began to develop showing more Republicans moving into the Graddick column. The last poll conducted showed Graddick with over 85 per cent. During the last three days before the election, Graddick was getting 88 per cent of Republicans polled. Dr. Ingram reflected that on the basis of his polls he would be surprised if Graddick got less than 90 per cent of the Republican vote. He made no effort to measure the crossover vote and admitted that two-thirds of the persons who called themselves Republicans did not vote in the Republican primary on June 3, 1986, and were not crossovers. He did not in his survey ever attempt to measure the opinions of crossover votes, and it is crossovers who are central to the contest before the Subcommittee.

Dr. Gordon G. Henderson, president of the consulting firm Gordon G. Henderson, Inc., which markets his services, studied the data base of the election after the election by applying regression analysis to the results. He determined that on June 24, Graddick had received "extremely close to 100 per cent of ... the Republican vote."23/ Dr. Henderson conducted regression analyses on approximately 75 per cent of the total

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23/ Regression analysis is one statistical or mathematical procedure which enables one to measure the strength between two variables. If one factor is known, the other can be predicted. The base Republican strength for the regression analysis was either the Republican votes cast for the governor on June 3, 1986, or those cast for the Senate. Since the Senate vote was higher than the vote for governor, Dr. Henderson defined that as the measure of Republican strength. This ignores the Republican who voted in both Democratic primaries (about two-thirds according to Ingram). Neither can it be assumed that the two groups (Republicans who did and did not vote in the first Democratic primary) voted in the same way.

Republican vote for the Senate as of June 3, without including the absentee ballots. He repeatedly stated that the analyses showed almost 100 per cent of the Republican vote went to Graddick on June 24. When specifically asked if he had determined the number of crossover votes, however, he stated he had "not been able to determine that." It is the specific number of votes cast on June 24 that is determinative. The will of the people cannot be circumvented by anything less, and the court cannot accept Dr. Henderson's testimony when he continues to espouse the theory that almost 100 per cent of the Republicans voted for Graddick. When questioned about Henderson's study, Dr. Davis stated that results generated from regression analysis are more accurate than predictions of pollsters, but only if the data are good data.

Even the figures presented to the Committee by Tom Fletcher, Baxley's campaign manager, are inconclusive. The Baxley group

determined that the June 3 Republican turnout was 36,448 by applying this formula:

$$\text{Senate turnout each box} / \frac{\text{Rate of turnout}}{\text{Republican turnout by box}}$$

From a comparison of the June 3 Republican blue lists to the voter lists on the 24th, using a sample of results from 13 counties representing 59 per cent of the vote, they identified 79 per cent of the voters as having participated in both races. From this list of names they positively identified 16,372 voters who did not cross over. They positively identified 10,406 legible signatures, representing 38.9 per cent of the vote. They applied that percentage to the 9,670 individuals they were unable to identify24/ and arrived at a bottom-line figure of 14,168 crossover voters in the Democratic runoff. By

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24/ 1,908 signatures were illegible. They were unable to examine the material for 7,762 people because of missing data.

application of the 38.9 per cent figure to the 9,670 unidentified voters, they determined that 3,762 of them were crossover Republicans.25/

10,406	crossovers
3,762	figure by applying percentage of 9,670 unidentified
14,168	crossover votes

These figures do not reflect the results of Winston County26/ which has historically been the most Republican county in the state. The court has taken judicial notice that in Winston County, in the June 3 primary, Baxley received 42.1 per cent of the votes cast to 36.7 per cent of the votes cast for Graddick. The other candidates received 21.2 per cent of

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25/ Mr. Fletcher conceded that there were eight different possible types of disagreements as to the numbers dependent upon the three or four different categories in which a voter could be placed.

26/ In Winston County 2,834 votes were cast in the Republican Senate race; 2,582 for Denton and 252 for Vickers.

the registered votes cast. On June 24, Baxley received 51.4 per cent of the vote cast to 48.6 per cent votes cast for Graddick. These election results do not appear to reflect any Republican crossover, much less one of 38.9 per cent, the percentage of the June 3 Republican vote which Fletcher considered to be Republican crossovers. The total vote in the runoff was smaller than that of June 3. The increases shown for each candidate reflect only those expected without any distortions from crossover voting. Fob James divided the conservative vote June 3 with Graddick, and it was expected that his votes would very likely go to Graddick in the runoff. George McMillan asked his supporters to vote for Graddick. Still, Graddick got only 318 more votes in the runoff to 193 for Baxley. Baxley carried this very Republican county in both primaries. There is just no sign of Republican crossover voting in Winston County. None of the "experts" made any similar analyses; yet they

presumed to opine that their sample precincts were "typical." Such an opinion is not worthy of belief.27/

27/ In Winston County, 2,834 voted in the June 3 Republican primary.

If 38.9 per cent had crossed over June 24, there would have been an influx of 1,102 voters who did not vote in the June 3 Democratic primary. If there had been any significant crossover voting, there would surely have been more votes in the Democratic runoff than were cast June 3. But there was a decrease of almost ten per cent! Forty per cent of the June 3 total primary vote in Winston County was cast in the Republican primary. Yet there was both a decrease in the total vote in the Democratic runoff and no observable reason for suspicion that Graddick got more votes than would be reasonably expected in the runoff without any crossovers.

Other counties which have historically shown themselves to have large Republican voting populations by percentage of the total vote include Franklin County (won by Baxley in both primaries by a large margin), DeKalb, Cullman, Chilton, Shelby, Blount, and St. Clair (but not including the North Shelby areas of recent rapid growth.) No analysis by the "expert" witnesses of any of these counties was presented to the Subcommittee (and, therefore, not to this court). Without such an analysis, there is no way that the analyses which were made can be considered as showing what the typical Republican voting

(Footnote Continued)

Additionally, Jefferson and Mobile

(Footnote Continued)
pattern was among the crossover voters. The "experts" simply did not inform themselves sufficiently to be able to testify as to typicality or the percentages Baxley and Graddick could have expected to receive from this voting population. Certainly, there were over 2,800 Republican voters in Winston County in the July 3 Republican primary, but there is no evidence that they crossed over on June 24. But the "experts" have applied a statewide percentage of crossover voting to this county simply as if the figures quoted above did not exist. This creates a gross distortion, for 8-9 per cent of the statewide total of votes in the Republican primary were cast in this one small county! One effect of taking this county properly into account would be to reduce the supposed 14,106 crossovers by 8 per cent, leading to a result of 12,978. This reduction makes it impossible for crossover voting to account for the entire margin of Graddick's victory.

When Davis's 83.5 percentage is applied to this number, we find 10,837 of these votes for Graddick and 2,141 for Baxley, with a margin of only 8,696. Graddick would still win the election by 60 votes. This is not to mean that Davis's 83.5 per cent is the correct figure. It is simply to illustrate that her figure is better than those given by Ingram and Henderson. They did not measure crossovers at all. He did not truly express an expert opinion based on data, even unsound data. Henderson's conclusion that only one-tenth of one per cent of the crossovers

(Footnote Continued)

Counties, two of the three considered,

(Footnote Continued)
voted for Baxley is totally absurd. Such an opinion is not worthy of credence in any court. The court's discussion of the Winston County results alone destroys Dr. Henderson's conclusion. Eight per cent of the statewide Republican primary votes were in that county. The court's discussion shows that there is no discernible crossover effect in the Democratic runoff in that county. Henderson would apply 99.9 per cent to an arbitrary percentage of all Republican votes regardless where they were cast. He is an Indianian who knows nothing about Alabama, and especially nothing about Republican voting patterns. For that matter, none of the experts showed any understanding of Republican voting patterns.

Even, however, applying Davis's 83.5 per cent to the appropriate numbers, Graddick still has a winning margin. This is without making any adjustments for the independents who signed petitions for independent candidates and then voted in the Democratic June 3 primary. These voters were barred by the same rule that bars Republicans voting in the June 3 primary from voting in the June 24 runoff. These were voters in overwhelmingly black boxes. Baxley was endorsed by all the black organizations. The history of this kind of endorsement in Alabama is that over 90 per cent of the black votes are cast for a candidate so endorsed. A proper application of the party rule to these petitioners would increase the Graddick winning margin by about 1,000 more votes.

(Footnote Continued)

traditionally have high Republican voter turnouts. An unspecified Republican box either in Jefferson or Shelby County was used as an example, showing Graddick as having a 500 per cent increase. If the unidentified box were one in Mountain Brook, Alabama, it would not be representative of the state, for Mountain Brook, a wealthy conservative area, is not representative of any other area of the state. If the box were in Shelby County, it could have been in the highly mobile northern part of the county, inhabited by a "Yuppie" population, or in the southwestern part of the

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(Footnote Continued)

The Subcommittee made no such correction, and neither did the experts. It was a denial of due process for the Subcommittee to fail to follow its own rule in this regard.

If a similar analysis were to be made using the Republican voters in Franklin, DeKalb, Cullman, Chilton, Shelby, Blount, and St. Clair Counties, the Graddick margin would likely grown even more. In any event, it is clear that the experts simply failed to make an appropriate analysis and, therefore, their opinions are not worthy of belief.

county, which is traditionally "hard core" Republican. Neither area would be representative of the voting pattern of the state.

Regardless of whose figures, estimates or calculations are used, and in light of Mr. Fletcher's concession that the Republican voters could be classified in several ways, this court is unwilling to let the State Democratic Executive Committee, any Democratic candidate, or any pollster opine how Republicans voted in the June elections, and to let their will thus be substituted for that of the voters. Indeed, it would be an impossibility for anyone to predict Republican voting patterns, for Alabamians have been unpredictable in their voting, and no election in any year reflects consistency in the numbers in the Republican Party. The numbers vary depending on the election. The state's history shows that Alabama has been listed in the Republican column for presidential elections in recent years far more times than it

has been in the Democratic one. Alabama has gone Republican in 1964, 1972, 1980 and 1984, with Reagan polling 872,849 votes in 1984. Presently, one of her two senators is a Republican. Two districts have been represented by Republicans in Congress continuously since 1964, and three others part of that interim. Senator Denton received 51 per cent of the votes cast in the 1982 gubernatorial election, and former Republican Congressman Albert Lee Smith, Jr., received 35 per cent of the votes cast in his bid for the Senate in 1984 against the very popular incumbent, Howell Heflin.

Regardless of whether polling or more accurate regression analysis was used, this court cannot allow the results of an election to be determined on the polled intentions of a small segment of the population in which even a few duplications could greatly distort the findings, or upon a mathematical formula in which the hypothesis

is based on anything other than 100 per cent of the boxes in the state.29/ Neither can this court accept the conclusion that 99.9 per cent of the Republicans who voted in the Democratic runoff voted for Charles Graddick. This conclusion makes no provision for whether or not those interviewed identified themselves as Republicans or as voters who had voted in the June 3 Republican primary and intended to vote in the Democratic runoff on June 24. If these "Republicans" voted in the first Democratic primary, they would not be part of a valid sample, for they would not be illegal

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29/ Certainly counties such as Winston, Franklin, DeKalb, Cullman, Blount, St. Clair and Chilton should be included in the analysis. They have a history of large Republican voting populations for more than 100 years and their patterns of Republican voting are quite different from the three counties which were selected for analysis as "typical." It is here that the "experts" committed their most critical error -- in their assumptions (and that is all they were) of typicality.

crossover voters. If they did not vote in the June 24 primary, they would not be a part of a valid sample. Nor did the poll determine if those interviewed were "hard-core" Republicans who would never vote in a Democratic primary, or whether they would rather vote for Baxley or not at all because they considered Graddick a "turncoat." Those in either classification would not be measured by the procedures used.

None of the experts made adjustment for independents or for those voters who signed a petition for a Montgomery County independent candidate and of whom 97 per cent (according to Davis) cast their ballots for Baxley in the runoff. Davis admitted this adjustment would reduce Baxley's vote by 1,222. Nor did the Subcommittee make such an adjustment.

Regardless of how many polls or analyses were run, the incontrovertible conclusion is that no one knows to a certainty how the voters cast their ballots. Not one

voter testified as to his or her actual vote, and no one used investigative polling techniques to inquire into votes actually cast. This court has been unable to find a single precedent which allowed election contest results to be based solely on the opinions and guesses of pollsters. This court would not expect, in any event, ever to find precedent for the use of polling data in an election contest of intentions rather than actual votes, unless possibly a suitably large sample were to be taken very close to the election, with sample size and results of such nature as to clearly show only one possible result, with a high degree of confidence. Even then, history has shown that in United States elections polling errors often occur. The court doubts that the State Democratic Executive Committee would like it to believe that, on the basis of last-minute polls, the Democratic Party would have conceded the election in the 1948 Dewey-Truman contest. Polls and

pollsters are not infallible. If they were, there would be no need for the citizens to vote. The decision of the Subcommittee of the State Democratic Executive Committee to base an election result on this inconclusive speculation can only be classified as an arbitrary, capricious action, amounting to a denial of due process. The fundamental rights of voting and access o the ballot cannot be denied without substantial certainty. Accordingly, this court rules:

(1) The State Democratic Executive Committee cannot overturn an election on the basis of polling data, and

(2) Even if the Committee could overturn an election on the basis of polling data, it could not do it on the basis of the inaccurate polling data used here.

Defendants have raised the issues of res judicata, collateral estoppel, and full faith and credit in this action on the basis of the history of this controversy. This

court does not have the authority to sit as an appellate court, and has no intention of doing so. It does, however, have the authority to decide federal constitutional questions. Deprivation of the constitutional right to vote is a denial of due process, and it is this issue which is raised in the instant cause. In arguing that this contest is barred by res judicata and collateral estoppel, the defendants have directed attention to Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984).

The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These comments are referred to collectively by most commentators as the doctrine of "res judicata." See Restatement Second of Judgments, Introductory Note before Chapter 3 (1982); 18 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure, Section 4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, supra, Section 27. This effect is also referred to

as direct or collateral estoppel. Claim preclusion refers to the effect of the judgment in foreclosing litigation of the matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar.

This Court on more than one occasion has used the term "res judicata" in a narrow sense, so as to exclude issue preclusion or collateral estoppel. See, e.g., Allen v. McCurry, 449 U.S. 90, 94 (1980); Brown v. Felsen, 442 U.S. 127 (1979). When using that formulation, "res judicata" becomes virtually synonymous with "claim preclusion." In order to avoid confusion resulting from the two uses of "res judicata," this opinion utilizes the term "claim preclusion" to refer to the preclusive effect of a judgment in foreclosing relitigation of matters that should have been raised in an earlier suit.

Migra, at 77, n.1.

Earlier decisions of state and federal tribunals have not precluded this court from sitting in judgment. This finding is based entirely upon federal constitutional law. The argument that Graddick's Section 1983 claims against Baker and the state party arose out of the same "transaction or occurrence" heard by the Henderson court does not stand. This claim arises from conduct which

occurred after the three-judge decision: the decision of the State Democratic Executive Committee to invalidate the election results of the June 24 primary and certify Bill Baxley to the Secretary of State as the winner of the Democratic primary.

Res judicata applies in Section 1983 cases only when the claims asserted in the civil rights suit are identical to those raised in the state court proceedings. Williams v. Sclafani, 444 F. Supp. 906 (S.D.N.Y. 1978). The Sclafani court further held that res judicata does not apply in Section 1983 suits with respect to claims that could have been litigated. Sclafani, supra, at 915 (citing Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976, 95 S. Ct. 1400, 43 L. Ed. 2d (1975)). This exception to the res judicata doctrine in civil rights suits is based in part on the policy that Section 1983 relief was intended to be supplemental to state

relief and that plaintiffs should be able to utilize both federal and state forums when one cause of action gives rise to state and federal claims. Lombard, supra, at 635-36. Collateral estoppel "applies only when an issue raised in a second action was actually litigated and was necessary to the determination of the first action." Lombard, supra, at 637.

The Sclafani court specifically held that res judicata, collateral estoppel and full faith and credit do not bar plaintiffs from pursuing their civil rights claims when they have been unconstitutionally denied access to the ballot and voters have been denied the right to cast their votes. "The same policies which favor a relaxed principle of res judicata in civil rights suits also militate against giving full faith and credit to the state court judgment." Sclafani, supra, at 916. Nevertheless, the defendants have argued that University of Tennessee v.

Elliott, __ U.S. ___, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986), is controlling in this case. Elliott addressed the question of whether a finding of a state administrative law judge is entitled to preclusive effect in federal court, holding that "[t]his court has held that section 1738 (Full Faith and Credit) requires that state-court judgments be given both issue and claim preclusion in subsequent actions under 42 U.S.C. § 1983. Allen v. McCurdy, 449 U.S. 90 (1980) (issue preclusion); Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984) (claim preclusion)."

In its opinion, however, the court noted that Allen and Migra would not be controlling in Elliott. The court did hold that when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate that the federal courts must give the agency's

fact-finding the same preclusive effect to which it must be entitled in state court." Elliott, 54 U.S.L.W. at 5087 (quoting Utah Construction and Mining Company, 384 U.S. 394, 422 (1966) (emphasis added)).

The very thing that makes this case distinguishable from Utah and its progeny, including Elliott, is that the parties did not have "an adequate opportunity to litigate" the issue now before this court -- whether the Subcommittee decision violated the constitutional rights of the various plaintiffs here. Graddick's 1983 claim did not arise until August 15, 1986, when the Subcommittee of the State Democratic Executive Committee announced its decision that Baxley had received the most legal votes and certified the same to the Secretary of State. The three-judge United States District Court for the Middle District of Alabama in Henderson did not adjudicate the merits of Graddick's, and Curry's and Farnell's claims, which address the August 15

decision as a denial of constitutional rights. Accordingly, there can be no res judicata or any other form of preclusion.

The three-judge court said, in specifically refusing to rule on the question before it:

> Having fulfilled its obligations under section 5 [of the Voting Rights Act] this court has no authority to determine whether the primary election contest conducted by the State Democratic Executive Committee complied with Alabama law or is unconstitutional.

Nor did the Alabama Supreme Court rule on the merits of state law issues. Ex parte Graddick (Alabama Supreme Court, slip op. Sept. 3, 1986). It dismissed the claims for failure to exhaust remedies in the State Democratic Executive Committee.

Although this court is of the opinion that res judicata and collateral estoppel are not applicable in the instant Section 1983 suit, "if a reasonable doubt as to the applicability of the estoppel exists, it must be resolved against precluding

litigation of the issue." Clark v. Lutcher, 436 F. Supp. 1266, 1272 (M.D.Pa. 1977). The appeals procedure for elections is set out in Title 17-6-[illegible], Code of Alabama (1975). While it is true that courts generally hold that election disputes are statutory and that the requirements must be strictly followed, Parker v. Mt. Olive Fire & Rescue District, 420 So. 2d 31 (Ala. 1982); Ex parte State ex Rel. Bragg, 240 Ala. 80, 197 So. 32 (Ala. 1940); Ex parte Skidmore, 277 Ala. 221. 168 So. 2d 483 (Ala. 1964); Godfrey v. Oswalt, 428 So. 2d 40 (Ala. 1983), the state's power to regulate its elections may not be used to circumvent a federally protected right such as the right to vote. On the other hand, a state's construction of statutes outlining the manner in which it regulates its elections cannot be altered by a federal court unless the state laws or practices violate federal statutes or the Constitution. Harris v. Conrado, 675 F.2d. 1212 (11th Cir. 1982).

In analyzing the matter before the court, this court has determined that the more important rights established by the due process clause of the fourteenth amendment and the incorporation of the first amendment rights into that amendment outweigh strict adherence to the Alabama statute. "The due process clause has been held to protect individuals from the arbitrary application of statutes." Gartrell v. Knight, 546 F. Supp. 449 (N.D. Ala. 1982) (citing Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)). Gartrell reiterated that private conduct which is an integral part of the electoral process is deemed "state action." Smith v. Allwright, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944); United States v. Classic, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1948). Furthermore, it has been held that "[t]he State Democratic Executive Committee [of Alabama] is an official arm of the state and its action

constitutes state action." Davis v. Schnell 81 F. Supp. 872, 878 (S.D. Ala.), aff'd 366 U.S. 933, 69 S. Ct. 749, 93 L. Ed. 1093 (1949). "Thus, as a state actor, the activities of the Alabama Democratic Party come under constitutional scrutiny. The party, like other state agents, is constitutionally bound to follow its own rules." Gartrell, at 452.

Certainly the State Democratic Executive Committee cannot apply its rules and Alabama statutes in invalidating votes cast for Graddick if it does not apply those same rules and statutes to the votes cast for Baxley. The court has taken judicial notice that over 1,200 names were signed to petitions in Montgomery County on the June 3 election date. In the ensuing June 24 runoff, that same box went heavily for Baxley. Davis testified that in this predominantly black box, the vote for Baxley would be over 97 per cent. The Committee did not apply its own

rules and invalidate any votes from that box, nor did the Committee make any finding of the number of independent votes which were cast. Dr. Davis testified that a proper finding would be to reduce Baxley's total by 1,222. This reduction, together with a finding that Graddick got 83.5 per cent of the crossovers, would show Graddick to have legally won the election.

In Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), rehearing en banc denied 664 F.2d 291 (11th Cir. 1981), the Fifth Circuit said:

> In this due process case, the court reasoned (a) that the "liberty" protected from state impairment by the due process clause of the fourteenth amendment includes the freedoms of speech and association guaranteed by the first amendment; (b) that these first amendment freedoms extend to political activities such as running for elective office; and (c) that state election practices must therefore serve legitimate state interests "narrowly and fairly to avoid obstructing and diluting these fundamental liberties." 657 F.2d at 702 (discussing Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970).

It is the clearly established constitutional right to vote, and the right to have the vote counted, accompanied by the right of access to the ballot and all of the fundamental constitutional rights encompassed therein that this court has had to consider. The State Democratic Executive Committee was and is unable to ascertain with mathematical certainty the number of "illegal" votes cast. By changing the election results without evidence it has violated the due process clause of the fourteenth amendment by undermining the fundamental fairness of the electoral process, necessitating court intervention. Its transactions in disenfranchising voters cannot be tolerated.

In argument presented in defense of the Committee's actions, the Committee stated, through counsel:

> The finding of the Subcommittee was, in essence, a determination not only of which candidate received the most votes, but <u>of which candidate will best serve the party as a standard bearer</u> in the

general election based on the best evidence available.

For a political party to present the brazen idea that it is answerable to no one and can substitute its own will for that of the electorate shocks the conscience. While the court will admit that, in times past, the King of England claimed to rule by divine right, it can find no instance in which the Alabama State Democratic Executive Committee has heretofore made such a claim.

In reaching its conclusion, the court has determined that it is the State of Alabama and its people who primarily have been injured. Only by requiring a new election can their rights be restored. However, Charles Graddick cannot come before this court seeking equity unless he is willing to act equitably. He cannot seek injunctive relief in this court against the State Democratic Executive Committee and at the same time campaign as an independent candidate for governor. "He who seeks equity must do equity." Accordingly,

this court will order that Charles Graddick file with this court by 12:00 noon on Friday, September 19, 1986, a written waiver and consent to issuance of an injunction by this court that he abandon his independent, write-in candidacy. If Mr. Gradick timely files his waiver and consent, this court will then order that the Alabama State Democratic Executive Committee's certification of William J. Baxley be declared null and void and that a new runoff primary election by held between Baxley and Graddick as soon as possible.

If Charles Graddick fails to timely file such a written waiver and consent with this court thereby signifying his intent to run as an independent, the court will order that the relief prayed for by Graddick will be denied for his unwillingness to do equity. As to plaintiffs Curry and Farnell, the relief will also be denied as a discretionary decision of this court. This court will not order a new primary election to include

Graddick while he pursues a campaign as an independent.

DONE this 17th day of September, 1986.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

J. FRANK CURRY and DANIEL R. FARNELL, SR., on behalf of themselves and all others similarly situated, Plaintiffs, v. JOHN BAKER, as Chairman of the Alabama State Democratic Executive Committee; and THE ALABAMA STATE DEMOCRATIC EXECUTIVE COMMITTEE Defendants.	CIVIL ACTION NO. 86-G-1617-S (CONSOLIDATED)
CHARLES D. GRADDICK, Plaintiff, v. JOHN BAKER, as Chairman of the State Democratic Executive Committee and the STATE DEMOCRATIC EXECUTIVE COMMITTEE, Defendants.	CIVIL ACTION NO. 86-G-1626-S

AMENDMENT TO OPINION

The court's memorandum opinion heretofore entered on September 17, 1986, is hereby AMENDED in the following respects:

(1) On page 24, footnote 29 is amended to read footnote 28.

(2) On page 27, following the first full sentence in the last paragraph, footnote 29 is added, to read as follows:

29/ In no event could Curry and Farnell be precluded on any of the theories asserted. They have not previously litigated any issues.

(3) On page 23, line 8 is amended to read as follows:

"cast in the 1980 senatorial election, and former Republican"

In all other respects this court's memorandum opinion entered September 17, 1986, is hereby RATIFIED and REAFFIRMED in its entirety.

DONE and ORDERED this 18th day of September 1986.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

J. FRANK CURRY and DANIEL R. FARNELL, SR., on behalf of themselves and all others similarly situated, Plaintiffs, v. JOHN BAKER, as Chairman of the Alabama State Democratic Executive Committee; and THE ALABAMA STATE DEMOCRATIC EXECUTIVE COMMITTEE, Defendants.	)	CIVIL ACTION NO. 86-G-1617-S
		(CONSOLIDATED)
CHARLES D. GRADDICK, Plaintiff, v. JOHN BAKER, as Chairman of the State Democratic Executive Committee, and the STATE DEMOCRATIC EXECUTIVE COMMITTEE, Defendants.	)	CIVIL ACTION NO. 86-G-1626-S

ORDER

In conformity with and pursuant to the Memorandum Opinion entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that Charles D. Graddick file with this court by 12:00 Noon on Friday, September 19, 1986, a written waiver and consent to issuance of an injunction by this court that he abandon his independent, write-in candidacy. If Mr. Graddick files his waiver and consent by Noon Friday, this court will then order that the Alabama State Democratic Executive Committee's certification of William J. Baxley be declared null and void and that a new runoff primary election be held between Baxley and Graddick as soon as possible.

If Charles Graddick fails to file such a written waiver and consent with this court by Noon Friday, thereby signifying his intent to run as an independent, the court will order that the relief prayed for by Graddick will be denied for his unwillingness to do

equity. As to plaintiffs Curry and Farnell, the relief will also be denied as a discretionary decision of this court.

The court reserves the right to add to its opinion at any time before the final order is filed.

DONE and ORDERED this 17th day of September 1986.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

J. FRANK CURRY and DANIEL R. FARNELL, SR., on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 86-G-1617-S
JOHN BAKER, as Chairman of the Alabama State Democratic Executive Committee; and THE ALABAMA STATE DEMOCRATIC EXECUTIVE COMMITTEE,	)	
Defendants.	)	
		(CONSOLIDATED)
CHARLES D. GRADDICK,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 86-G-1626-S
JOHN BAKER, as Chairman of the State Democratic Executive Committee, and the STATE DEMOCRATIC EXECUTIVE COMMITTEE,	)	
Defendants.	)	

ADDENDUM TO OPINION

The court hereby adds the following comments to its opinion filed with its interlocutory order entered September 17, 1986:

Mr. Henderson's regression analysis has at least three flaws. He fails to take into account the McMillan vote. McMillan had much support in the same affluent precincts where Graddick had support and where there was Republican strength. He threw his support in the runoff to Graddick. Henderson also fails to account for the James vote. So-called "Republicans" include many thousands of voters who voted quite legally in both the Democratic primaries of June 3 and June 24. James had well over 20 per cent of the total vote in the June 3 primary. It was widely considered that he and Graddick were dividing the same conservative vote, and therefore it was assumed by political observers that the bulk of the James

vote would go to Graddick in the runoff, despite some bad blood between James and Graddick personally. Much of James's support was from Republicans. He had been a Republican, as had Graddick. Both had become reborn Democrats in the 1970's. The pockets of Republican strength coincide very largely with the pockets of James strength. As a matter of fact, Republican strength and James strength frequently include the same people. Nevertheless, those who voted in the Democratic primary June 3 were not crossovers as that term has been used in this case. It is only those who voted in the Republican primary June 3, then voted in the Democratic primary June 24 that we are here concerned with.

Henderson also failed to take into account any of the counties where Republican strength goes back to the Civil War. These counties include Winston, Franklin, DeKalb, Blount, Cullman, St. Clair, Chilton, and Shelby. Only Shelby among these counties was

considered by any of the pollster witnesses. Shelby has changed more than the others because it is now a bedroom community for Birmingham, and the north part of Shelby is growing very rapidly for this reason. North Shelby has a large "Yuppie" population. We do not know whether those witnesses who said they considered Shelby County were considering north Shelby or the other pockets of Republican strength in that county. We do know that none of the other counties with a Civil War Republican background were considered at all. We know from looking at Winston County that the results there are quite different from the state as a whole, as is discussed elsewhere herein.

Ingram measured Republican opinion but when asked his definition of Republican he just said he asked them what political allegiance they claimed. If the voter said he was a Republican, that is what Ingram put down. We do not know what the voter's definition

was, nor what Ingram was measuring. In any event, he admitted that only 3.55 per cent of the total primary votes were in the Republican as opposed to the Democratic primary on June 3. He has identified 10.6 per cent of the electorate as Republican. This means that two-thirds of his identified Republicans did not vote in the Republican primary on June 3. Since the witnesses agree that 1.7 per cent of the total vote on June 24 was from Republican crossovers, this means that 8.9/10.6 (or about 84 per cent) of the Republicans interviewed by Ingram are not included among the June 24 crossovers. Dr. Davis, interestingly, noted that you can't measure crossover votes by sampling Republicans generally "because the crossovers are much more intense in their feelings." (Record, p. 77)

Ingram could as easily have been measuring James or Graddick (or other) voters who were really Republicans but who voted legally in both Democratic primaries. He made

no attempt to differentiate between Republican crossovers and other Republicans.

All of the expert witnesses admitted that they were applying professional judgment -- that is, an educated guess. All admitted their opinions were not based entirely on the numbers they had obtained, but upon their personal opinions as to how Alabama voters would act. Both Ingram and Davis said this.

Only Henderson claims to have used a formula which always works and does not require the application of individual judgment as to how Alabama voters act. His opinion was that Graddick got 99.9 per cent of the cross-over vote, if not 100 per cent. Common sense tells us that this opinion is much too extreme to be credible. Furthermore, Davis measured 36 per cent of the Republican voters favoring Baxley as late as May 29, five days before the first primary election. Henderson's conclusion would force us to believe that all of these changed their minds by June 24. Courts

are supposed to use some common sense. Henderson's conclusion is impossible.

Davis admitted to a very significant error in at least one respect -- that she over-estimated the number of crossover votes by 14 per cent. She had estimated a total of 15,833, but the final number determined by the Baxley campaign was 14,256, based on actual count, with some appropriate adjustment. This was the testimony of Baxley's campaign manager, Mr. Fletcher.

Davis testified that for Baxley to win the election it must be found that 81 per cent of the crossover vote went to Graddick. She was ignoring any adjustment for the persons who signed petitions for independent candidates and therefore disqualified themselves from voting in the Democratic primary. Later in her cross-examination she did apply her figures of 97.02 per cent for Baxley in the black boxes, and concluded that if the signers of independent petitions were allowed

for, Baxley would suffer a net reduction in his vote of 1,222. What all this means is that, in fact, Graddick must be found to have obtained 85 per cent of the Republican crossover vote in order for the election to be dead even.

The only person who attempted to measure opinion among crossover voters was Davis. Her numbers indicated 83.5 per cent of the crossovers would vote for Graddick. There are problems with the size of her sample and the long period of time over which the sample was taken (three weeks). There are also problems with her statement that the crossover samples were consistent throughout the three weeks prior to the runoff. Ingram said that Graddick was gaining all the time among Republicans generally. Davis said the crossover population would act differently from Republicans in general, and this seems to prove it. Her figures for the Graddick vote among crossovers was 83.5 per cent. This is

not enough to elect Baxley. Admittedly, she gave an opinion that the true figure was actually more, but this was apparently wishful thinking. The evidence shows that she was a paid pollster for the Baxley campaign. Her sampling had a potential error of plus or minus 7.6 per cent. Therefore, it is possible that the true percentage ran as high as 91 per cent, but it is also possible that it ran as low as 76 per cent.

There is more likelihood under this analysis that Graddick truly won the election than Baxley did. If the figure of 83.5 per cent is accepted at face value, Graddick won. When the issue is so extremely close, and when it is in fact impossible to tell from the data who truly won, the only reasonable solution is another election. No other solution would be a just one.

Baxley's witnesses said that the 39 per cent crossover figure (39 per cent of all Republicans) would hold indefinitely and

throughout the state. But this was before anyone saw the Winston County figures. As mentioned elsewhere in this opinion, those figures show a reduction in total vote between the two primary elections of 394. The witnesses at the hearing would have applied their 39 per cent figure and would have assumed, therefore, that 1,102 of the Republican voters in the June 3 primary voted in the Democratic primary June 24. Instead of an increase of 1,102 voters, we have a loss of 394!

Generally across the state the vote was lighter in the runoff than it was in the first primary, but it is obvious that nowhere near 1,102 crossovers voted in Winston County. That would have meant, allowing for the overall reduction, that 1,498 fewer Democrats voted June 24 than on June 3. This is almost 40 per cent of the June 3 vote. It patently and obviously did not happen, and no "expert" swearing that it did happen can make it so. Furthermore Graddick gained only 125 net votes

in Winston County between the two primaries. If 1,102 Republicans showed up and voted in the runoff, and if they voted 99.9 per cent for Graddick, this would have meant not over two of them voted for Baxley and would have resulted in a huge increase in Graddick's share of the vote, which simply did not happen. He gained 318 votes and Baxley gained 193. Baxley carried the county in both elections. If the figures testified to by the experts were reliable, why are the Winston County results totally at odds with their opinions? It is important to remember that eight per cent or more of the Republican vote statewide was cast in the Winston County Republican primary. It is a small county, but not small in terms of Republican population.

The Subcommittee decision can also be said to violate the one-man one-vote rule. Substituting a sample of 5,300 interviewees for the 930,000 actual voters means each interviewee replaces 175 actual votes. This

is a serious dilution rising to the constitutional level.

ORDERED this 18th day of September, 1986 that the above and foregoing addendum be made a part of this court's opinion filed with its interlocutory order entered September 17, 1986.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

J. FRANK CURRY and DANIEL R. FARNELL, SR., on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 86-G-1617-S
JOHN BAKER, as Chairman of the Alabama State Democratic Executive Committee; and THE ALABAMA STATE DEMOCRATIC EXECUTIVE COMMITTEE,	)	
Defendants.	)	
		(CONSOLIDATED)
CHARLES D. GRADDICK,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 86-G-1626-S
JOHN BAKER, as Chairman of the State Democratic Executive Committee, and the STATE DEMOCRATIC EXECUTIVE COMMITTEE,	)	
Defendants.	)	

FINAL ORDER

In conformity with and pursuant to the interlocutory order issued by this court September 17, 1986, by which Charles D. Graddick has filed with this court a written waiver and consent to the issuance of an injunction by this court abandoning his independent, write-in candidacy, it is

ORDERED, ADJUDGED and DECREED that Charles D. Graddick be and he hereby is ENJOINED to withdraw his write-in candidacy and not to resume the same without prior authorization from this court. It is further

ORDERED, ADJUDGED and DECREED that under Title 17-16-36, Code of Alabama (1975), any prior certification by the Alabama Democratic Executive Committee declaring William J. Baxley as the nominee of the Democratic Party for governor be and it hereby is declared NULL and VOID. It is further

ORDERED, ADJUDGED AND DECREED that the Alabama State Democratic Executive Committee, any of its officers, agents, servants,

employees, or any other person acting in concert with them be and they hereby are ENJOINED from further interfering with the primary runoff election between Charles D. Graddick and William J. Baxley. It is further

ORDERED, ADJUDGED and DECREED that, pursuant to Title 17-7-1 of the Code of Alabama (1975), any certification by the Secretary of State of Alabama naming William J. Baxley as the nominee for governor be and it hereby is declared NULL and VOID. It is further

ORDERED, ADJUDGED and DECREED that the Alabama State Democratic Executive Committee be and it hereby is ENJOINED from certifying William J. Baxley as the nominee of the Democratic Party for governor based on the election results of June 24, 1986. It is further

ORDERED, ADJUDGED and DECREED that the Alabama State Democratic Executive Committee be and it hereby is enjoined to conduct a

new runoff primary between Charles D. Graddick and William J. Baxley as soon as possible. It is further

ORDERED, ADJUDGED and DECREED that the Alabama Democratic Executive Committee, any of its officers, agents, servants, employees, or any person in concert with them, be ENJOINED from certifying under Title 17-16-36, Code of Alabama (1975), or under any other applicable law, any person as the nominee of the Democratic Party of Alabama other than the candidate receiving the majority of the votes cast for governor at the second runoff primary hereby ordered without prior order and approval of this court. This court retains jurisdiction to issue such orders and to grant such supplemental relief as may be applicable. It is further

ORDERED, ADJUDGED and DECREED that the Secretary of State of Alabama be and he hereby is ENJOINED from certifying William J.

Baxley as the nominee of the Democratic Party for governor. It is

ORDERED, ADJUDGED and DECREED that the United States Marshal forthwith serve a copy of this Final Order upon the Secretary of State of Alabama, the Honorable Don Siegleman.

DONE and ORDERED this 18th day of September 1986.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7639

J. FRANK CURRY, DANIEL R. FARNELL, SR. and CHARLES A. GRADDICK,

Plaintiffs-Appellees,

versus

JOHN BAKER, as Chairman of the Alabama State Democratic Executive Committee, WILLIAM J. BAXLEY and KENNETH and NELLIE PIKE,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Alabama

Before* GODBOLD, VANCE and JOHNSON, Circuit Judges.

BY THE COURT:

The Order of the district court is STAYED pending further order of this panel. Further order on the Motion for Stay and an order on the Motion for Expedited Appeal will hereafter be entered by this panel.

*This order was entered by a quorum.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-7639

J. FRANK CURRY, DANIEL R. FARNELL, SR. and CHARLES A. GRADDICK,

Plaintiffs-Appellees,

versus

JOHN BAKER, As Chairman of the Alabama State Democratic Executive Committee, WILLIAM J. BAXLEY and KENNETH and NELLIE PIKE,

Defendants-Appellants.

Appeal from the United States District Court For the Northern District of Alabama

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Before GODBOLD, VANCE and JOHNSON, Circuit Judges.

B Y T H E C O U R T:

Appellants Amended Motion for Stay and Expedited Appeal is GRANTED.

The final order or judgment of the district court entered September 18, 1986 and

all further proceedings in district court cases Civil Action No. 86-G-1617-S and Civil Action No. 86-G-1626-S are STAYED pending further order of this court.

Both appellants and appellees are directed to file memorandum briefs on or before noon, Wednesday, September 24, 1986. In addition to such other arguments as the parties elect to present, said briefs shall address the following: (1) whether the prior proceedings in either (a) the United States District Court for the Middle District of Alabama or (b) the Alabama Supreme Court have res judicata effect; (2) all Supreme Court of the United States, Eleventh Circuit or binding Fifth Circuit precedent that may be applicable in a determination as to whether the facts in this case may constitute a violation of 42 U.S.C. § 1983; and (3) the standing of each of the parties and the justiciability of their claims.

Oral hearing is set before this panel of the court at the United States Courthouse in Montgomery, Alabama at 10:00 A.M. on Thursday, September 25, 1986.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-7639

J. FRANK CURRY and DANIEL R. FARNELL, SR.,on behalf of themselves and all others similarly stated,

Plaintiffs-Appellees,

versus

JOHN BAKER, as Chairman of the Alabama State Democratic Executive Committee; and THE ALABAMA STATE DEMOCRATIC EXECUTIVE COMMITTEE,

Defendants-Appellants

WILLIAM J. BAXLEY, JERRY HENDERSON, DEJERILYNN HENDERSON, CHARLES KENNITH PIKE & NELLIE KENT PIKE,

Defendant Intervenors Appellants.

- -

CHARLES D. GRADDICK,

Plaintiff-
Appellee,

versus

JOHN BAKER, as Chairman
of the State Democratic
Executive Committee and
the STATE DEMOCRATIC
EXECUTIVE COMMITTEE,

Defendants-
Appellants

JERRY HENDERSON, DEJERILYNN
HENDERSON AND WILLIAM J.
BAXLEY,

Defendant
Intervenors
Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

Before GODBOLD, VANCE and JOHNSON, Circuit
Judges

GODBOLD, Circuit Judge:

This court has before it for appellate review the latest trial court ruling concerning the 1986 gubernatorial primary of the Alabama Democratic Party. Subject to specific exceptions, federal courts should not be involved in settling state election disputes. Sound reasons grounded in both law and public policy establish that far better forums for disputes involving elections to state offices are found in the party machinery and the court system of the affected state. We follow that policy here.

The defendants appeal from a judgment of the United States District Court for the Northern District of Alabama in consolidated cases brought under 42 U.S.C. § 1983. One case is brought by Attorney General Charles A. Graddick, a candidate for the Democratic nomination for governor. The other case is filed by two of Mr. Graddick's supporters, J. Frank Curry and Daniel R. Farnell, Sr. Section 1983 is the federal statute under

which a citizen may bring suit in a federal court, alleging that persons acting under color of state law have deprived him or her or rights secured by the Constitution of the Untied States.

Plaintiffs alleged in their complaints that an election contest of the Democratic runoff primary, which contest resulted in the Democratic Party's nomination of Lt. Gov. William J. Baxley as its candidate for governor, deprived them of due process and equal protection of the laws as guaranteed by the Constitution of the United States. The district court held that the party subcommittee that heard the contest had violated due process, and on September 18, 1986 it ordered the Democratic Party to conduct a new runoff primary. This appeal followed.

On motion of appellants the district court's injunction was stayed and the case expedited. Briefs from all parties were received September 24, and oral argument was

heard by the court in Montgomery, Alabama on September 25.

I.

THE CENTRAL ISSUE, THE FACTUAL BACKGROUND, AND THE PROCEEDINGS TO DATE

A. The Origin of the Controversy.

In the Democratic primary conducted June 3, 1986 no candidate for the Party's nomination to run for governor in the general election in November 1986 received a majority. It was thus necessary that the Democratic Party conduct a runoff primary. In the Democratic primary runoff, held June 24, massive illegal "crossover voting" occurred. In the context of this case "crossover voting" means that persons who had voted in the Republican primary (also conducted on June 3), where they either voted for, or had the opportunity to vote for, a Republican nominee to run for governor in the November election, "crossed over" and voted in the Democratic runoff

primary on June 24 and thereby participated in the Democratic Party's choice of its nominee for governor to run in the general election in November. In short, "crossover voters" participated in the choices by two political parties of their respective party nominees for governor to run against each other in the same general election.

A tabulation of all legal and illegal votes in the Democratic runoff resulted in totals of 470,051 for Mr. Graddick and 461,295 for Mr. Baxley, a difference of 8,756 votes. In a contest filed before the State Democratic Executive Committee Mr. Baxley contended that Mr. Graddick was guilty of election fraud and that Mr. Baxley received a majority of the legal votes cast. The Democratic Party found that Mr. Graddick had committed flagrant violations of federal and state law and certified Mr. Baxley as its nominee for the general election.

Unless this appeal is decided on issues arising before the merits are reached, the central issue before this court concerns the methods and the evidence used by the contest subcommittee in determining that Mr. Baxley received a majority of the legal votes cast and, as a result, in certifying him as the nominee of the Democratic Party.

B. The Rule Against Crossover Voting.

Pursuant to statutory authority, Ala. Code § 17-16-14 (1975), on April 21, 1979 the State Democratic Executive Committee adopted the following rule, which now appears as Article VII, § 1(e) of the Party's rules:

> Any person who (1) votes in any primary election of another political party, (2) participates in the nominating process of another party's candidate(s) or (3) promotes the candidacy of an independent candidate, shall not be entitled to vote in Primary Elections of the Democratic Party held in the calendar year in which such person does any of said prohibited act(s). Without limiting the foregoing, any person who votes in the first primary election of another political party shall not be entitled to

vote in the Democratic Party's run-off Primary Election which follows such first primary election. (emphasis added)

This provision has the force and effect of law. Ala. Code § 17-16-14. The rule was submitted to the Attorney General of the United States and in 1980 was precleared by him under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c). As discussed below, plaintiffs do not contend in this court that this rule of the Democratic Party is invalid.1/ Rather they object to the manner in

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1/ The right of a political party to protect itself from intrusion is long recognized. Under a closed primary system in which only enrolled members of a party may vote in that party's primary, the Supreme Court has described as "raiding" the actions of voters in sympathy with one party in designating themselves as voters of another party so as to influence or determine the result of the other party's primary. Rosario v. Rockefeller, 410 U.S. 752, 760-62 n.10 (1973). In Ray v. Blair, 343 U.S. 214 (1952), the Supreme Court upheld the right of the Democratic Party of Alabama to require a candidate running in the Democratic primary for presidential elector to pledge an aid and

(Footnote Continued)

which the contest subcommittee decided the contest.

C. Violation of the Rule

During the runoff campaign (the period between the June 3 Democratic primary and the June 24 Democratic runoff), Mr. Graddick openly solicited crossover voters. His opponent, Mr. Baxley, publicly contended that those who had voted in the June 3 Republican primary should not and could not vote in the Democratic runoff primary. On the day before the election a Mobile attorney representing Mr. Graddick went before a state judge in Mobile seeking a temporary injunction against interference by election officials with

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(Footnote Continued)
support the nominee of the Democratic National Convention for president and vice president. The Court referred to the pledge as "a provision [that] protects a party from intrusion by those with adverse political principles." Id. at 221-22.

crossover voting. He obtained an order setting the matter for hearing. Included in the order, drafted by the attorney, was an "admonition" to election officials that if they impeded the exercise of the right to vote based upon the Rules of the Alabama Democratic Party they could not escape personal liability if the court later found the Rules invalid. The order was widely publicized.

On election eve Mr. Graddick caused a letter to be issued on the state Attorney General's letterhead, signed by the Chief of the Voter Fraud Division of his office, warning all election officials against attempts to enforce the rule against crossover voting and threatening that any such attempt could subject such officials to liability. The letter was hand delivered throughout the state by Mr. Graddick's campaign workers.

Four Republican state senators, the highest elected Republican state officials in Alabama, joined in the effort to encourage

crossover voting through television advertisements calculated to assure persons who had voted in the June 3 primary that they could properly cross over and legally vote for Mr. Graddick. The Republican chairman of Madison County sent out 5,000 letters to persons in the Huntsville area soliciting votes for Mr. Graddick and made a publicized statement that it was "the responsibility of every citizen to vote in [the Democratic] runoff."

Approximately 14,168[2]/ persons who had voted in the June 3 Republican primary crossed over and voted in the June 24 Democratic runoff.

D. The Alabama Contest Mechanism

Alabama statutes commit to the state executive committees of the political parties

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2/ The determination of this number is discussed infra.

the responsibility and authority to conduct primary election contests. Ala. Code §§ 17-16-70 through 17-16-89. In discharging that responsibility the party committee exercises powers "such as those conferred on a court of special and limited jurisdiction." Boyd v. Garrison, 19 So.2d 385, 388 (Ala. 1944). The statute provides for the issuance, through the clerk of the circuit court, of subpoenas and orders for production of documents and commissions for taking of depositions, as required by either party to the contest or by the party chairman. § 17-16-84.

The state party chairman is empowered to appoint a subcommittee to hear and decide any contest. § 17-16-82(c). That was done in this case.

Under Ala. Code §17-16-72 the contestant's burden is to reasonably satisfy the contest committee that the apparent winner of the primary did not receive the required number of legal votes. The committee is then

specifically empowered to declare the legal nominee. A new primary may be directed only if it is impossible for the committee to determine the legal nominee. Ala. Code § 17-16-87.

An appeal lies from the context subcommittee to the party's state executive committee, "which shall be the court of final appeal in all party contests." Ala. Code § 17-16-87; Ex parte Charles A. Graddick, _____ So.2d _____ (Ala. [Sept. 3] 1986). There is no statutory right of appeal to the state courts. Id.

E. The Baxley-Graddick Contest.

The contest at issue was processed under the statutory provisions outlined above. Discovery was had, hearings were held by the subcommittee, and evidence was received.

The contest subcommittee had before it votes, legal and illegal, in the numbers of 470,051 for Mr. Graddick and 461,295 for

Mr. Baxley. It received evidence concerning the activities of Mr. Graddick in soliciting and encouraging crossover votes and in issuing directives as Attorney General of Alabama to voting officials requiring that they allow crossover votes. It had before it the findings, conclusions and judgment of the three-judge district court in Henderson v. Graddick, _____ F.Supp. ____ (M.D. Ala. 1986) (CA-86-R-680-N, August 1, 1986). As described more fully below, Henderson was a case brought in the United States District Court for the Middle District of Alabama, in which it was contended that Mr. Graddick violated the Voting Rights Act, 42 U.S.C. § 1973c, by using his office to encourage the violation of the Democratic Party's anti-crossover rule that had been approved by the Attorney General of the United States, without first receiving "preclearance," thereby violating § 5 of the Act. A three-judge district court was appointed as required by the Act. On August 1,

1986, before the subcommittee decided the contest, that court held that Mr. Graddick had committed flagrant violations of the Voting Rights Act and of state law from which he directly benefited.

The Republican and Democratic primaries are held simultaneously in Alabama. When a voter presents himself or herself to vote at a polling place the voter's name is checked from a list of all registered voters compiled without indication of party affiliation. The voter declares whether he or she will vote in the Republican or Democratic primary. If the voter declares Republican, he or she signs in on a blue poll list or sign-in sheet and is then presented with a Republican ballot (the ballot may be either on a machine, a computer sheet or a paper ballot). If the voter declares Democratic, he or she signs in on a white poll list and is then presented with a Democratic ballot. Ala. Code § 17-16-14(b) provides:

> All polls lists for primary elections shall state at the top thereof that by participating in said primary election a voter shall indicate his preference for the party holding said primary, and will support the nominees of that party in the general election, and that he is qualified under the rules of such party to vote in its primary election. No person shall be eligible to participate in said primary unless he signs said poll list and thereby certifies to the truth of said statement. (Acts 175, No. 1196, § 13).

The evidence before the subcommittee conclusively showed that a substantial number of crossover votes had been illegally cast in the June 24 Democratic runoff primary. A more firm figure would have been obtainable by comparing all blue sheets (Republican) from the June 3 balloting and the white sheets (Democratic) from the June 24 runoff. (Obviously there were no blue sheets from the June 24 balloting because there was no statewide Republican runoff.) An exact figure would not have been possible because not all signatures were legible. Of the signatures available 1,908 were illegible, and positive comparisons of these signatures could not be made. The

committee also found that the blue sign-in sheets for 7,762 persons who voted in the June 3 Republican primary, then in the custody of Republican county officials, were not produced in response to issued subpoenas. Nevertheless, the subcommittee positively identified 10,406 legible signatures of persons who did cross over and 16,372 June 3 Republican voters who did not cross over.3/ Projecting these known proportions to the 9,670 persons who voted Republican on June 3 but whose crossover status was unknown because of illegible signatures or blue sheets not available for signature comparisons, the subcommittee found a bottom line figure of 14,168 illegal crossover votes cast in the Democratic primary runoff on June 24.

The contest subcommittee then heard extensive evidence with respect to how the

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3/ Approximately 36,448 persons voted in the June 3 Republican primary.

crossover voters cast their votes in the June 24 Democratic runoff. The evidence was in the form of expert opinion from political scientists and public opinion surveyors. It was largely based on polls and surveys conducted in Alabama during the interim between the June 3 primary and the June 24 runoff.

The Alabama statute provides a procedure by which individual voters can be subpoenaed in the case of a contest and required to testify as to how they voted. Ala. Code § 17-16-75. Where the alleged irregularity involves a comparatively small number of votes, this method enables a contest subcommittee to ascertain precisely how many illegal votes were cast to arrive at an exact result. Counsel for Mr. Graddick concede, however, that utilization of this procedure was impossible in this instance, because the number of votes to be examined were those of the more than 14,000 crossover voters in the June 24 Democratic runoff.

On the basis of the evidence as to the number of illegal votes cast and opinion evidence with respect to how these votes were cast, the contest subcommittee concluded that Mr. Baxley received a majority of the legal votes cast. The subcommittee then certified Mr. Baxley as the nominee of the party.4/

F. Prior Legal Proceedings.

Litigation began even before the June 24 runoff when Mr. Graddick obtained the court

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4/ Three motions for disqualification of Mr. Graddick as a candidate had been filed by five Democratic voters and were considered by the same subcommittee. The subcommittee's order, dated August 15, 1986, indicated that it considered itself bound by the injunction entered by the three-judge district court in Henderson v. Graddick either to determine that Mr. Baxley received a majority of legal votes cast or to call a new runoff. The order stated, "Other possible options or alternatives under Alabama law are not available." Although it heard evidence on the disqualification issue, the subcommittee reserved its ruling on that issue.

order from the state court in Mobile designed to facilitate crossover voting.

On election night Mr. Graddick, this time represented by an attorney who also serves as general counsel of the Republican Party, applied to and obtained from Jefferson County state circuit judge an ex parte order directing that certain ballot boxes be impounded.

After the contests of the Democratic runoff primary were filed, Mr. Graddick went back three times to the same Jefferson County circuit judge, and on all three occasions he obtained favorable orders. The first two orders, obtained ex parte, had the effect of impeding the Democratic Party's processing of the contest and its use of subpoenas to obtain from Republican county chairpersons the records that were essential to establish the exact number of crossover votes. These two circuit court orders were promptly reversed by the Alabama Supreme Court. After the second reversal the Supreme Court issued an

extraordinary order stating "That the Circuit Court of Jefferson County is hereby restrained and enjoined under penalty of law from entering any other orders or judgments involving the pending democratic gubernatorial primary election contest other than as directed in Paragraph 2 of this order." Paragraph 2 directed the circuit judge to issue a judgment on the merits of Mr. Graddick's petition pending before him within two days. The circuit judge entered an order, without findings of fact or conclusions of law, declaring that Mr. Graddick had won the runoff. This order was promptly vacated by the Supreme Court.

In the meantime, on July 11, two black county officials as representatives of a class composed of all black registered voters who had voted in the June 3 and June 24 Democratic primaries, had filed Henderson v. Graddick in the Middle District of Alabama, challenging, under § 5 of the Voting Rights Act of 1965, 42

U.S.C. § 1973c, the legality of the crossover voting practice Mr. Graddick personally and through his office as Attorney General fostered and encouraged. After a hearing, the three-judge district court ruled that the Democratic Party's rule prohibiting crossover voting was valid and binding, that many thousands of crossover voters had voted illegally, that Mr. Graddick's actions utilizing his authority as Attorney General of the state had flagrantly violated the Voting Rights Act and that he had violated state law as well. The court enjoined the State Democratic Executive Committee from certifying Mr. Graddick as its nominee for governor and ordered it either to call a new runoff primary or to certify Mr. Baxley as the nominee.

Hearings before the contest subcommittee followed quickly. On August 15 it made its decision and certified Mr. Baxley. Mr. Graddick did not appeal to the full State Democratic Executive Committee. Mr. Graddick

turned instead to the Alabama Supreme Court, filing on August 27, 1986 a "Petition for Writ of Mandamus, Writ of Prohibition and Other Extraordinary Relief." The court dismissed the petition because Mr. Graddick, having failed to appeal to the State Democratic Executive Committee, had not exhausted his administrative remedies. Ex parte Graddick, supra.

Mr. Graddick and Messrs. Curry and Farnell then filed two new suits in a new forum, the United States District Court for the Northern District of Alabama, claiming violations of the due process and equal protection clauses of the Constitution. The cases were consolidated and assigned to a district judge.

The district court held that the merits of the case were properly before it and that the suit was not barred by the previous adjudications in state and federal courts. On the basis of a stipulated record it found that

the Democratic contest subcommittee "violated the due process clause of the fourteenth amendment by undermining the fundamental fairness of the electoral process." Its judgment, entered September 18, enjoined the Democratic Party to decertify Mr. Baxley and call a new primary runoff. The injunction also had the effect of enjoining the Party from disqualifying Mr. Graddick, an issue that had been reserved by the contest subcommittee and was not before the district court. This appeal followed.

II.

PRELIMINARY ISSUES

A. Res Judicata.

The appellants contend that under principles of res judicata the § 1983 claims asserted by Mr. Graddick and Messrs. Curry and Farnell had been determined in the prior litigation and in the proceedings before the subcommittee and could not be reasserted in

the two later-filed cases that are before this court. Application of res judicata is central to the fundamental purpose of the judiciary -- the conclusive resolution of disputes. Montana v. United States, 440 U.S. 147, 153 (1979). Finality "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980). These policies apply with equal force when the second lawsuit is brought in a federal forum. By federal statute, state judicial proceedings must be given the same full faith and credit in the federal courts as they enjoy in the courts of the state in which the proceedings occur. 28 U.S.C. § 1738. Thus, a final judgment from the Alabama Supreme Court has the same preclusive effect upon the federal courts as it does upon Alabama courts. See Migra v. Warren City School District Board of

Education, 465 U.S. 75 (1984) (state law determines claim preclusion in § 1983 action); Allen v. McCurry, 449 U.S. 90 (1980) (state law determines issue preclusion in § 1983 action).

In Ex parte Graddick the Alabama Supreme Court issued the following order: "The time for appeal of the subcommittee's decision in the contests having expired and no appeal having been taken, the decision of the subcommittee must stand, and no court is authorized to extend judicial relief." This order prevents any Alabama court from overturning the decision of the subcommittee. Mr. Graddick has now asked the federal courts to grant him this relief.

The "full faith and credit" statute, 28 U.S.C. § 1738, and the principles of comity between state and federal courts impel us toward giving effect to the order of the Alabama Supreme Court that "the decision of

the subcommittee must stand, and no court is authorized to extend judicial relief."5/

5/ Also, arguably the cases now before us are nothing more than attempts to appeal from and set aside the judgment of the Alabama Supreme Court. It is long settled doctrine that only the Supreme Court of the United States may hear appeals from the highest court in a state. 28 U.S.C. § 1257; Rooker v. Fidelity Trust Co., 263 U.S. 413, 416(1943). It follows ineluctably that a federal court has no jurisdiction over issues that are "inextricably intertwined" with allegations underlying the judgment of a state supreme court. This maxim holds true even when the challenger asserts a constitutional claim. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486-87 (1983). In Reynolds v. Georgia, 640 F.2d 702 at 707 (5th Cir. Unit B), reh'g denied, 645 F.2d 72, cert. denied, 454 U.S. 865 (1981), we observed:

> Despite plaintiff's portrayal of her dissatisfaction with the Georgia [Supreme] Courts decisions as a distinct injury, it is manifest from the prayers of her complaint that she seeks essentially an appellate review of those decisions. "It is the essential criterion of appellate jurisdiction, that it revises and corrects the

(Footnote Continued)

However, under Alabama law, four elements must be present for there to be claim preclusion: 1) a prior judgment rendered by a court of competent jurisdiction; 2) substantial identical parties in both suits; 3) a prior judgment rendered on the merits; and 4) the

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(Footnote Continued)
proceedings in a cause . . . ." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175, 2 L.Ed. 60 (1803). "[T]o reverse or modify [a] judgment [of the state supreme court] . . . would be an exercise of appellate jurisdiction." Rooker, 263 U.S. at 416, 44 S.Ct. at 150. The addition of several new defendants in this action does not alter the prohibited character of relief she seeks, see id. at 414, 44 S.Ct. at 149, nor is it significant that she presents her claim under section 1983 as well as under the Constitution. [Citation omitted]. Plaintiff still seeks a type of review which is beyond the power of this Court.

The district court noted that it "does not have the authority to sit as an appellate court." Arguably that is precisely what it did.

same cause of action in both suits. Missildine v. Avondale Mills, 415 So.2d 1040, 1042 (Ala. 1981). There is a question whether the third prong of this test has been satisfied in this case. Alabama courts regard a decision as "on the merits" unless the outcome is controlled by technical defects in the pleadings. Compare, DeCrosta v. A. Reynolds Construction and Supply Corp., 364 N.E.2d 1129 (N.Y. 1977) (judgment based on statute of limitations defense is "on the merits"). Alabama courts will generally give a decision preclusive effect "if . . . the parties had a full legal opportunity to be heard on their respective claims and contentions." ABC Truck Lines, 25 So.2d 511, 513 (Ala. 1946).

As noted above, the Alabama Supreme Court dismissed Mr. Graddick's case for failure to exhaust his administrative remedies by appealing the subcommittee's decision to the full Committee. Whether in this circumstance Alabama courts would consider plaintiffs as

having "had a full legal opportunity to be heard" and their claims therefore precluded, is an issue both complicated and not free from doubt. For this reason, and for these additional reasons, we decline to reach a decision on res judicata grounds: 1) the constraints of time in our decisionmaking process, (2) the comparative ease involved in reaching a decision on the merits, and (3) the overriding public interest in a dispositive result.

B. Effectiveness of the Rule.

We understand that plaintiffs do not challenge in this court the validity of the Democratic Party's rule against crossover voting. Indeed, they could hardly do so; the validity of the rule was squarely adjudicated by the three-judge court in Henderson. While, as discussed just above, we decline to decide this case on the basis that the claims Mr. Graddick now asserts have been determined in prior litigation ("res judicata"), it is clear

that issues raised and decided in prior litigation to which Mr. Graddick was a party ("issue preclusion") are binding on him and were binding on the district court. Despite this principle, the district court's Memorandum Opinion of September 17 treats the validity of the rule as a matter of considerable doubt. This is simply wrong.

Plaintiffs contend that the subcommittee could not decide the contest based on data secured through surveys and by polling voters. At the same time they conceded that because of the massive number of illegal crossover voters it was impossible to call all these voters in to testify and conduct a one-by-one examination of how each voted on June 24. Thus, plaintiffs contended that the only remedy was to order a new runoff between Mr. Baxley and Mr. Graddick. These contentions must be measured in the light of the purposes of the rule and its effectiveness and the interests vindicated by it.

The crossover rule is a proper response to the Alabama State Democratic Executive Committee's responsibility under Alabama law. It is clear and unambiguous. It is manifestly reasonable. It has the force and effect of state law. Ala. Code § 17-16-14. Since its clearance under the Voting Rights Act any inconsistent practice has been prohibited as a matter of federal law.

There has been no room for uncertainty about what the rule means or its validity. The district court speculated that the Democratic Party may have been bound by an alleged past practice of allowing crossover votes. The three-judge court in Henderson v. Graddick found that there had not been such a practice, and the district court in this case was bound to respect that finding. Beyond that, the record does not support the existence of a past practice of allowing crossover votes. The three-judge opinion in Henderson dealt effectively with the "failure to enforce"

contention. This is the first occasion in which a violation of this particular rule has been the basis of a contest filed before the Democratic Executive Committee. There is no indication in the record that in any other contests the State Committee has failed to resolve such contests in accordance with its responsibilities. There is no indication in the record that at any time since the adoption of the "no crossover" rule there has been a massive crossover of illegal voters such as voted in the June 24 Democratic primary runoff or that the outcome of any other primary election between 1979 and 1986 would have been affected by crossover votes.

The district court also questioned whether the electorate was "properly" notified of the rule against crossover voting. Assuming that publicity is necessary, the opinion in Henderson sets out the significant steps taken by the Democratic Party to publicize the crossover rule throughout the state. To be

sure, there was some confusion before and during the Democratic primary runoff. Undoubtedly innocent persons were misled and voted illegally but, as the Henderson decision points out, the principal actors who caused the confusion, and did so in violation of law, were Mr. Graddick and those aligned with him. They are in no position to seek substantive advantage from this confusion.

C. Magnitude and Effect of the Violation.

By conduct that was adjudged in Henderson to constitute flagrant violations of the Voting Rights Act and of state law, Mr. Graddick and those working with him orchestrated the casting of thousands of illegal votes. The precise number cannot be ascertained. The record demonstrates with certainty that 10,406 illegal ballots were identified. The record shows with reasonable reliability that 14,168 illegal votes were cast. Mr. Graddick is in a poor position to

complain about the extrapolation of this final figure. His efforts, as reflected in the Henderson v. Graddick proceedings, to thwart the subpoenaing of June 3 election records, which were then in the hands of Republican officials, occurred at the precise time that steps were required to ensure that the records were preserved and produced.

Irrefutable evidence establishes massive violations of state and federal law. To the extent that the district court intimated to the contrary it was in error. It was not free to reexamine facts established by the three-judge court in Henderson and, when it did reexamine, its conclusion (or intimation) based thereon was manifestly incorrect.

D. The Disqualification Issue.

The contest subcommittee reserved the issue of whether it might disqualify Mr. Graddick as a candidate, apparently in compliance with its understanding of the Henderson

court's injunction. The subsequent order of the Henderson court eliminated any such constraint. Mr. Graddick concedes that the state party has the power to disqualify him. Protection from the party's power of disqualification is not even sought by either of plaintiffs' complaints. Yet, the district court's injunction inexplicably framed its proscriptive language to forbid Mr. Graddick's disqualification. This overreaching remedy would require reversal if the judgment of the district court were otherwise free of error.

E. The Standing of Appellees Curry and Farnell.

Plaintiffs Curry and Farnell voted for Mr. Graddick in the June 24 Democratic primary runoff. Both allege that they did not vote in the Republican Party primary on June 3. Thus they are not crossover voters.

These plaintiffs contend that the result of the election contest infringed their

constitutional right to have their individual votes counted (although in fact their votes were counted, since they were not crossovers), to have winner declared based on a count of votes actually cast by a majority of qualified voters, and they also allege that the effect of their votes was diluted. This court has serious doubt whether they had standing in the district court and whether they have standing in this appeal.6/ Despite these serious

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6/ They assert that the use of polling data by the subcommittee undermines the fundamental fairness of the electoral process. If the method used by the subcommittee was constitutionally flawed, the injury suffered was common to all voters, and indeed all citizens alike -- an injury to an interest shared by all citizens, to have a reliable determination of the winner in an election. In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court noted the distinction between "'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' not merely a claim of the 'the right possessed by every citizen to require that the Government be administered according to the law . . ." Id. at 208 (citations

(Footnote Continued)

doubts this court recognizes that a non-frivolous argument can be made that 42 U.S.C. § 1983 provides the required statutory

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(Footnote Continued)
omitted).

Inserting the term "vote dilution" in an election contest case is not a talisman. In Hubbard v. Ammerman, 465 F.2d 1169, 1182 (5th Cir. 1972), cert. denied, 410 U.S. 910 (1973), predecessor of this court held:

> In the absence of a statute to the contrary, none but a candidate claiming to have been injured by illegalities therein occurring can contest the certified results of an election. No private person can bring such a contest on the pretext of "redressing a public wrong."

The district court relied upon Gray v. Sanders, 372 U.S. 368 (1963), to find that Curry and Farnell had standing. Gray was a reapportionment of voting districts have standing to challenge the apportionment.

The prudence of granting standing to voters in the present situation is highly questionable. The ultimate thrust of the individual plaintiff's contention is that any voter can invoke federal jurisdiction to review the resolution of any vote tabulation or election contest with which he is dissatisfied. This would effectively federalize contests of state and local elections.

basis for standing. Because Mr. Graddick clearly has standing and other more reliable grounds for our decision are sufficiently broad to dispose of Curry's and Farnell's claims, we decline to rule on the issue of their standing.

III.

PLAINTIFFS' PRINCIPAL CLAIM FOR RELIEF

Plaintiffs contend that the contest subcommittee's consideration of data secured through surveys and polls entitled them to federal relief under § 1983. While recognizing that it was not possible to subpoena thousands of voters one by one and establish by testimony how each voted in the June 24 Democratic runoff, plaintiffs insist that the only alternative to this futile approach is to order a new runoff between Mr. Graddick and Mr. Baxley. They suggest no alternative and attack the alternative the subcommittee

pursued. The district court accepted plaintiffs' argument.

Plaintiffs admit, however, that the three-judge federal court and the subcommittee found that the runoff was marked by widespread misrepresentations and illegal actions by the Attorney General and his staff at the highest level. Plaintiffs also do not contest that the State Democratic Executive Committee was the responsible body under Alabama state law to determine the result of a contested primary. It had the duty, if such could be done, of ascertaining the candidate who had received a majority of the legal votes cast.

The district court erred in holding, as contended by Mr. Graddick, that the subcommittee's action could be supported only by a precise determination as to the specific number of votes illegally cast. The district court erroneously held that unless the number of illegal votes was established to a "mathematical certainty," there was "no evidentiary

basis" for the subcommittee's decision. This misperceives the duty of the subcommittee, the burden of proof established by state law, and the right of the subcommittee to determine the evidence it would consider.

Plaintiffs conceded in oral argument that the subcommittee did not intentionally or willfully deprive them of their rights; rather they contend that it used an unacceptable method and unacceptable data. The subcommittee had the duty, if such could be done, of ascertaining the candidate who had received a majority of the legal votes cast. Under the circumstances of this case we cannot conclude that the subcommittee could use only mathematically precise voter-by-voter testimony to determine which candidate received the most legal votes cast.

Under Alabama law, the contestants' burden of proof was to reasonably satisfy the committee. Possibly there might be a case in which the quantum of proof adduced was so

insufficient that a constitutional issue would be raised. This is not such a case. The evidence before the subcommittee was clearly sufficient to meet the statutory standard set by Alabama law. The subcommittee's findings based thereon were reasonable under the circumstances and were not arbitrary and capricious.

The findings of the subcommittee were accorded no deference by the district court. Instead the district court embraced Mr. Graddick's erroneous contention that he was entitled to the nomination or at least to a new election unless the mathematically exact number of illegal votes could be itemized and proved. Under this standard, massive voting irregularities could never be effectively redressed; it would put a premium on wrongdoing of enormous proportions.

For these reasons, and those discussed immediately below, the subcommittee's actions complained of do not implicate any federally

protected right. And, even if plaintiffs had demonstrated a federally protected right, the subcommittee's actions were permissible means of protecting a substantial state interest.

A. Failure to Establish a Constitutional Deprivation.

"The first injury in any section 1983 suit, . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" Baker v. McCollan, 443 U.S. 137, 140 (1979) (emphasis added). In this case Mr. Graddick and his supporters point to a fundamental right to vote grounded in the due process clause of the Constitution. They allege that this substantive due process right is diluted and debased by the subcommittee's reliance on polling data. Plaintiffs cite a number of cases where the dilution of votes has served as the basis for a constitutional violation. See Carrington v. Rash, 380 U.S. 89 (1965) (systematic discrimination against voters of a certain class); Reynolds v. Sims,

377 U.S. 533 (1964), reh'g denied, 379 U.S. 870 (1964) (malapportioned voting districts); Gray v. Sanders, 372 U.S. 368 (1963) (weighted voting systems); U.S. v. Saylor, 322 U.S. 385 (1944), reh'g denied, 323 U.S.809 (1944) (stuffing of ballot boxes).

The right to vote embodied in the substantive due process clause is considerably narrower than plaintiffs depict. "The functional structure embodied in the Constitution, the nature of the federal court system and the limitations inherent in the concepts both of limited federal jurisdiction and of the remedy afforded by § 1983" operate to restrict federal relief in the state election context. Gamza v. Aquirre, 619 F.2d 449, 452 (5th Cir. 1980), reh'g denied, 625F.2d 1016 (1980); see also Duncan v. Poythress, 657 F.2d 691 (5th Cir. Unit B 1981), reh'g denied, 664 F.2d 291 (11th Cir. 1981), cert. denied, 455 U.S. 937 (1982), cert. dismissed, 459 U.S. 1012 (1982). Although federal courts closely scrutinize

state laws whose very design infringes on the rights of voters, federal courts will not intervene to examine the validity of individual ballots or supervise the administrative details of a local election. Griffin v. Burns, 570 F.2d 1065, 1078 (1st Cir. 1978). Only in extraordinary circumstances will a challenge to a state election rise to the level of a constitutional deprivation. In Gamza v. Aguirre, 619 F.2d 449 (5th Cir. 1980), reh'g denied, 625 F.2d 1016 (1980) our predecessor court

> recognize[d] a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a [constitutional violation].

Id. at 453.

Plaintiffs contend that the subcommittee's arbitrary use of the challenged evidence was not such an "episodic event." In evaluating claim arising from "episodic events,"

courts have followed the general rule that "if the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots." Duncan v. Poythress, 657 F.2d at 703, quoting Griff v. Burns, 570 F.2d 1065, 1077 (1st Cir. 1978). See also, Welch v. McKenzie, 765 F.2d 1311, 1317, vacated on other grounds and remanded, 77 F.2d 191 (5th Cir. 1985); Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975). As with much of the law of substantive due process, there are no bright lines distinguishing "patent and fundamental unfairness" from "'garden variety' election disputes." See Welch v. McKenzie, 765 F.2d at 1317. The case law, however, demonstrates that plaintiffs' complaints fall far short of a constitutional deprivation.

Gamza v. Aquirre, 619 F.2d 449 (5th Cir. 1980) posed this issue in clear terms. Gamza and four of his supporters alleged that election officials had negligently and unlawfully performed the vote count, thereby costing him the election. The Fifth Circuit found that plaintiff failed to state a constitutional deprivation under § 1983.

> In the absence of evidence that the alleged maladministration of the local election procedures was attended by the intention to discriminate against the affected voters or motivated by a desire to subvert the right of the voters to choose their . . . representative, we cannot conclude that the error constituted a denial of equal protection of the laws.

619 F.2d at 454.

Plaintiffs in Johnson v. Hood, 430 F.2d 610 (5th Cir. 1970) also presented a claim closely analogous to the one before this court. There, plaintiffs alleged that the county election commission's decision to reject ten ballots as improper was arbitrary, capricious and without any reasonable basis. In a per curiam opinion ordering dismissal the

Fifth Circuit rejected this argument and ruled that these facts, even if true, failed to support a valid constitutional violation.

Plaintiffs, in Welch v. McKenzie, supra, alleged that an election was stolen by irregularity and fraud and that the Democratic executive committee acted contrary to the law in failing to overturn the election result. Relying on case law binding on this circuit, the Fifth Circuit concluded that this was a "garden variety" election dispute which did not rise to the level of a constitutional deprivation. The Welch court reasoned that Gamza set out the typical situation: "even though votes inadvertently counted incorrectly threw an election to the wrong candidate, this court refused to intervene." Welch, 765 F.2d at 1317. Citing Gamza as controlling, the Fifth Circuit held that the claim before it was not actionable in federal court because our federal system contemplates that states

will be primarily responsible for regulating their own elections.7/

Other circuits have consistently reached the same conclusion. Pettengill v. Putnam County School District, Unionsville, Missouri, 472 F.2d 121 (8th Cir. 1973) is another instance in which a federal court refused to interject itself into an election controversy. Pettengill raised the same constitutional complaint as plaintiffs here, claiming that the right to vote had been diluted by defendant's improper counting of ballots. The Eighth Circuit concluded that a federal court should not be "the arbiter of disputes" which arise in elections; it was not the federal court's role to "oversee the administrative

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7/ Even in cases involving overt racial discrimination this court has considered the voiding of a state election to be "drastic, if not staggering . . . and therefore a form of relief to be guardedly exercised." Bell v. Southwell, 376 F.2d 659, 662 (5th Cir. 1967).

details of a local election." The court found no constitutional grounds for intervention

> in the absence of aggravating factors such as denying the right of citizens to vote for reasons of race, or fraudulent interference with a free election by stuffing of the ballot box, or any other unlawful conduct which interfere with the individual's right to vote.

Pettengill, 472 F.2d at 122 (citations omitted). See also, Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975), and Powell v. Power, 436 F.2d 84 (2d Cir. 1970).

The instances in which courts have concluded that "the very integrity of the electoral process" has been brought into doubt bear little similarity to the facts before this court. In Duncan v. Poythress, 657 F.2d 691 (5th Cir. Unit B 1981) the claim did not even involve a disputed election; rather it was the failure to call an election that was the basis for the action. The Duncan court found a violation of constitutional rights when the governor and a state supreme court justice of Georgia intentionally and willfully

conspired to prevent a special election that was required by law. The court noted that the case involved not the dilution of votes but the violation of the entire electorate's right to participate in an election. The court also emphasized that defendants' intent was to prevent the exercise of the plaintiff's right to vote. These are very different circumstances from this case in which any deviation from absolute accuracy occurred as an incidental result of the Democratic Committee's attempt to determine the lawful primary winner in circumstances where plaintiffs had created the situation making absolute accuracy impossible.

Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) arose out of a Rhode Island local primary in which the secretary of state had authorized, advertised, and issued absentee ballots that the Rhode Island Supreme Court later ruled improper. Plaintiffs had relied on the government's assurances that absentee

ballots would be counted and chose to vote absentee rather than in person. The court recognized that the Constitution confers the "power to control the disposition of contests over elections to . . . state and local offices." Griffin, 570 F.2d at 1077 (quoting Hubbard v. Ammerman, 465 F.2d 1169, 1176 (5th Cir. 1972), cert. denied, 410 U.S. 910 (1973). The First Circuit believed, however, that these unique facts amounted to "a broad-gauged unfairness" which called the state's integrity, and those of the election results, into question. Almost 10% of the qualified voters in the election were denied their vote in a close election because of the state's own error. Significantly, there was also no standard state procedure for handling a claim such as Griffin's.

In this case the district judge became engulfed in the morass of election details. The bulk of the district court's opinion is consumed by the technical data of election

returns and polls and the nuances of Alabama voting trends. The high standards for making out a constitutional violation were propounded to prevent federal judges from speculating -- as did the district judge here -- about the voting proclivities of the "Yuppie" population of north Shelby County and the number of voters who signed a petition for a Montgomery County independent candidate. This kind of factfinding is for party officials and state courts, not federal judges. Errors in this sort of factfinding by a contest committee or a state court, if any occur, would be unfortunate but would not constitute "patent and fundamental unfairness."

Plaintiffs have attempted to recharacterize their claims in constitutional terms. The district court accepted this characterization as the cornerstone of its opinion. Plaintiffs' claims are, in truth, "the ordinary dispute over the counting and making of ballots," Duncan, 657 F.2d at 703.

In fact they are an even narrower dispute about evidence admissible in a contest over ballots. Settling a dispute brought about by illegal ballots was the task in which the State Democratic Executive Committee engaged. Plaintiffs alleged that the party's subcommittee used the wrong data and reached the wrong conclusion. That does not change the nature of the dispute. Such a dispute does not rise to the level of a constitutional deprivation.

There is no evidence that plaintiffs lacked an adequate remedy in the state courts. See Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978). Alabama law provides an adequate procedure for addressing election irregularities. Ala. Code 17-15-1 et. seq. Along with an opportunity to present evidence before the subcommittee, Mr. Graddick was entitled to appeal to the full State Democratic Committee. See Ex parte Graddick (Ala. Sup. Ct., September 3, 1986). If the full State Democratic Committee had denied his appeal, Mr. Graddick

had recourse to the state courts. Alabama state courts have recognized a duty to hear cases where the State Democratic Executive Committee has failed to follow the mandates of Alabama law. Perloff v. Edington, 302 So.2d 92 (Ala. 1974) (writ of prohibition); Hobbie v. Vance, 294 So.2d 743 (Ala. 1974) (declaratory judgment and mandamus). Plaintiffs elected not to appeal to the State Democratic Committee in accordance with state law. A federally protected right "is implicated where the entire election process -- including as part thereof the state's administrative and judicial corrective process -- fails on its face to afford fundamental fairness." Griffin, 570 F.2d at 1078. That is not the case here. State process was available but it was not used.8/

8/ Plaintiffs' arguments tend to stray into the arena of procedural due process. To the extent that a procedural due
(Footnote Continued)

B. Compelling State Interests Served by Reliance on Polling Data.

Even if plaintiffs' claimed deprivation had risen to a constitutional level, this court would be compelled to uphold the contest subcommittee's actions. The court below erred in failing to give sufficient weight to the substantial state interests served in this case by the use of polling data. In this case of massive voting illegality the use of such evidence made possible the protection of the state's interests in insuring honest and fair elections and preserving the rights of its voters and political parties.

Expert testimony such as that received by the contest subcommittee can play a critical role in safeguarding the fairness of the

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(Footnote Continued)
process claim is asserted, the existence of adequate state law remedies precludes plaintiffs from recovery under § 1983. See Parratt v. Taylor, 451 U.S. 527 (1981); Gilmere v. City of Atlanta, Ga., 774 F.2d 1495 (11th Cir. 1985) (en banc), cert. denied, 106 S.Ct. 1970 (1986).

election process. Without the use of this evidence election authorities would be powerless to deal with massive voting irregularities. Faced with wrongdoing on a grand scale, a ballot-by-ballot challenge to over 10,000, and possibly over 14,000, illegal votes was admittedly impossible.

Use of such evidence may also be necessary to protect the rights of voters and candidates. Requiring a new election in all cases of massive voting irregularities would impinge on the rights of those candidates who received the most lawfully cast votes. In addition, a new election would violate the rights of those who voted for the rightful victor. The due process clause protects the right of these voters to have their votes counted. U.S. Mosley, 238 U.S. 383, 386-87 (1915); Gray v. Sanders, 372 U.S. 368, 380 (1963). A state cannot be relegated to rules that inevitably would lead to the violation of the rights of innocent voters.

Acting pursuant to state law, the Democratic Party's contest subcommittee relied on polling and survey data to protect its state interests. No other method has been suggested by which the subcommittee could overcome the effect of the massive illegal voting that infected its primary runoff and determine the candidate with the most legally cast votes.

Courts have found statistical data to be relevant to a variety of determinations. See e.g., Jellibeans, Inc. v. Skating Clubs of Georgia, Inc., 716 F.2d 833 (11th Cir. 1983) (survey allowed to show that similar trademark confused consumers); Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977) (statistics allowed to make out prima facie case of employment discrimination). The courts permit, and often require, statistical data and surveys to prove discrimination in exclusion of persons from jury service on gender or race grounds, in age discrimination,

malapportionment, and in a wide range of other circumstances.

The United States Supreme Court has rejected the district court's conclusion that a ballot-by-ballot striking of voters is the only approach permitted by the due process clause. Indeed, the Supreme Court specifically rejected the notion that ballot-by-ballot striking of votes was even a viable approach to the crossover problem, the very problem before the Alabama Democratic Party. In Rosario v. Rockfeller, 410 U.S. 752 (1973), a New York statute that restricted voting in the Democratic primary to registered Democrats was challenged as a violation of plaintiff's right to vote. The plaintiff in Rosario, like the plaintiffs here, argued that a ballot-by-ballot striking of crossover voters was required since New York's method infringed on his right to vote. The Supreme Court upheld the New York law, holding that the law served an important role in the "preservation

of the integrity of the electoral process." Id. at 761. The Supreme Court considered a ballot-by-ballot approach too weak a means of remedying the crossover problem. It said this:

> The petitioners contend that New York already has less drastic means to prevent raiding [crossovers] -- means that would accomplish the State's goal yet would permit the registrant who inadvertently failed to enroll in time to vote in the primary. Specifically, the petitioners point to § 332 of the State's Election Law, which provides that the party enrollment of any voter may be challenged by any party member and, upon the determination of the chairman of the party's county committee that the voter is not in sympathy with the principles of the party, may be canceled by a justice of the State Supreme Court after a hearing. That section, however, is clearly too cumbersome to have any real deterrent effect on raiding in a primary. Every challenge to a would-be raider requires a full administrative and judicial inquiry; proof that the challenged voter is not in sympathy with the party's principles demands inquiry into the voter's mind; and even if the challenge is successful, it strikes from the enrollment books only one name at a time. In the face of large-scale raiding, § 332 alone would be virtually ineffectual. We agree with the Court of Appeals that "[i]n requiring that the State use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does

not require the state choose ineffectual means."

Id. at 762 n.10 (emphasis added).

The State Democratic Executive Committee simply followed the teachings of Rosario. It was the clear finding of the three-judge panel in Henderson that large-scale crossover voting had occurred. That federal court referred the matter to the party's contest subcommittee as the proper body under state law. The United States Supreme Court has found that the "distortions" posed by crossover voting threaten the "integrity and reliability of the electoral process itself," Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983), and that political parties may be forced to resort to strong measures to protect themselves against these "intrusion[s] by those with adverse political principles." See also Ray v. Blair, 343 U.S. 214, 221-22 (1952); Rosario v. Rockefeller, supra; Democratic Party of U.S. v. Wisconsin, 450 U.S. 107 (1981).

Faced with massive crossovers, the contest subcommittee heeded the Supreme Court's advice in Rosario and adopted the only practical approach available to it -- it utilized expert statistical and survey testimony as the most reliable evidence available to protect the fairness of the election process and the rights of Alabama's citizens and political parties. It cannot be held that its action shocks the conscience of a court. To the contrary, it was clearly reasonable under the circumstances before the subcommittee.

IV.

The district court erred in granting relief to the plaintiffs.9/ The judgement of

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9/ The court's requirement with respect to Mr. Graddick's write-in campaign was also erroneous. The effect of our ruling is to nullify that requirement and the written waiver and consent filed by Mr. Graddick to comply therewith.

the district court is reversed and its injunction is vacated. The case is remanded to the Northern District of Alabama with instructions to the Chief Judge of that court that he dismiss it immediately without further proceedings. Each party shall bear his own costs. The mandate shall issue forthwith.

REVERSED, INJUNCTION VACATED AND REMANDED WITH INSTRUCTIONS.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-7639

J. FRANK CURRY, et al,

Plaintiffs--Appellees,

versus

JOHN BAKER, et al,

Defendants-Appellants.

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Appeal from the United States District Court
for the Northern District of Alabama

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O R D E R:

(X) The motion of appellee, Charles A. Graddick for ( ) stay (X) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of appellee, Charles A.

Graddick for ( ) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

_____
UNITED STATES CIRCUIT JUDGE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

J. FRANK CURRY, DANIEL R. FARNELL, SR., and CHARLES A. GRADDICK,

Petitioners,

v.

JOHN BAKER, as Chairman of the Alabama State Democratic Executive Committee, the ALABAMA STATE DEMOCRATIC EXECUTIVE COMMITTEE, WILLIAM J. BAXLEY, KENNETH PIKE, NELLIE PIKE, JERRY HENDERSON, and DEJERILYN HENDERSON,

Respondents.

CERTIFICATE OF SERVICE

I, Hamilton P. Fox, III, a member of the Bar of this Court, hereby certify that on this 6th day of October, 1986, three copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit in the above-entitled case were sent

by Federal Express to: Jack Drake, Esq., Drake, Knowles & Pierce, P.O. Box 86, Tuscaloosa, Alabama 35402; Joe Espy, III, Esq., P.O. Box 1267, Montgomery, Alabama 36102; Edward Still, Esq., 714 South 29th St., Birmingham, Alabama 35233-2810; David Cromwell Johnson, Esq., Suite 900, Title Building, 300 North 21st St., Birmingham, Alabama 35203; and Herman Watson, Esq., P.O. Box 46, Huntsville, Alabama 35804, counsel for respondents herein. I further certify that all parties required to be served have been served.

_____

Hamilton P. Fox, III
Dewey, Ballantine, Bushby, Palmer & Wood
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 429-2335

Counsel for Petitioners